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Oct. 29. 1880

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~307.~~ 49

DAVIS R. BOOGHER, JESSE L. BOOGHER, RUFUS RANDALL, AND JOHN B. NOWLAN, PLAINTIFFS IN ERROR,

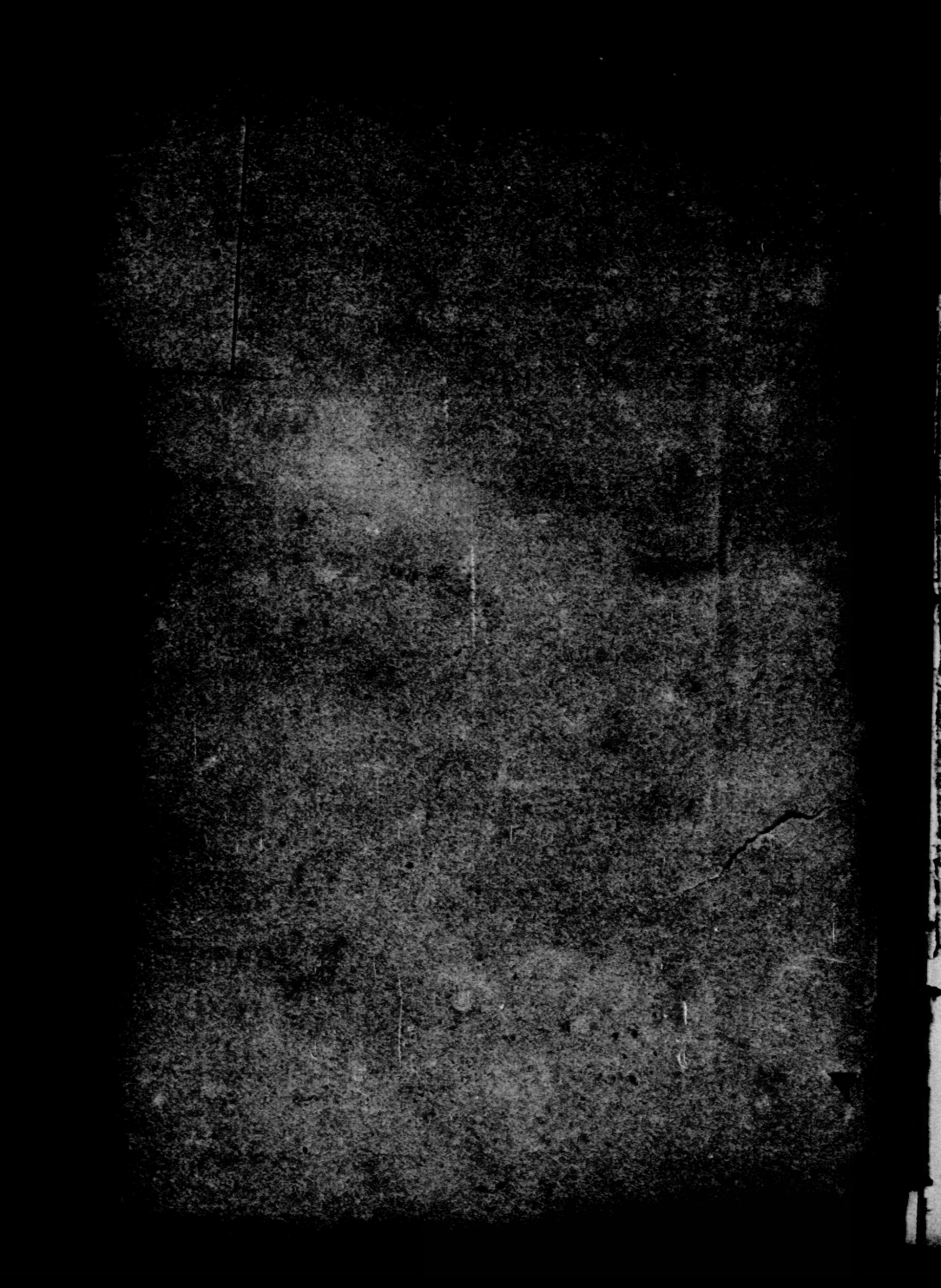
vs.

THE NEW YORK LIFE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 15, 1877.

12 1/2 Wall 235



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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, at the September term, 1876, thereof, between The New York Life Insurance Company, plaintiff, and Davis B. Boogher, Jesse L. Boogher, Rufus Randall, and John B. Nowlan, defendants, a manifest error hath happened, to the great damage of the said defendants as by their complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under you seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this day of January, in the year of our Lord one thousand eight hundred and seventy-seven.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[SEAL.] M. M. PRICE,
Clerk Circuit Court United States, Eastern District of Missouri.

Allowed by—

SAMUEL TREAT,
Judge.

2 *Return to writ.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the *the* record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of said circuit court, at office in the city of St. Louis, this 28th day of February, A. D. 1877.

[SEAL.] M. M. PRICE,
Clerk of said Court,
By A. P. SELBY,
Deputy.

3 The United States of America to New York Life Insurance Company, greeting:

You are hereby city and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second

Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein Davis R. Boogher, Jesse L. Boogher, Rufus Randall, and John P. Newland, plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this day of January, in the year of our Lord one thousand eight hundred and seventy-seven.

SAMUEL TREAT,
Judge United States Circuit Court Eastern District of Missouri.

4 I hereby waive the service of the within citation this 17th day of January, 1877.

F. N. JUDSON,
Attorney of Record for New York Life Ins. Company.

5 UNITED STATES OF AMERICA,
Eastern District of Missouri, sct:

Be it remembered that heretofore, to wit, on the first day of March, A. D. 1876, there was filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri a certain petition, which is in words and figures following, to wit:

Petition.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the circuit court of the United States, eastern district of Missouri.

THE NEW YORK LIFE INSURANCE COMPANY, plaintiff,
vs.
DAVIS R. BOOGHER, JESSE L. BOOGHER, RUFUS Randall, and John B. Nowlan, defendants.

Plaintiff states that it is now, and was at the time hereinafter mentioned, a corporation organized and doing business under the laws of the State of New York; that all of defendants are citizens of the State of Missouri and reside in the eastern district thereof, and that defendants Rufus Randall and John B. Nowlan were and are now partners under the name of Randall & Company.

That on or about the 1st day of November, 1871, plaintiff by a certain contract in writing, entered into with defendants Davis R. Boogher (which said writing is herewith filed and marked Exhibit A), appointed him its agent, for the purpose of procuring applications for life insurance for plaintiff in the State of Missouri and performing such other duties in connection therewith as should be entrusted to him. That on or about the 22nd day of December, 1871, in consideration of the trusts so imposed and thereafter to be imposed, said Davis R. Boogher, as principal, and Jesse L. Boogher, Rufus Randell, and John B. Nowlan, as sureties, made, executed, and delivered to plaintiff their certain

writing obligatory, sealed with their seals, and thereby held and
6 bound themselves jointly and severally unto plaintiff in the sum of $5,000.00, which said writing obligatory is herewith filed as Exhibit B and made a part of this petition; that said writing obligatory was made subject to a certain condition, thereunder written, in words as follows, to wit:

"That whereas the above bounden Davis R. Boogher has been appointed by said company as their agent for the purpose of procuring applications for life insurance and performing such other duties as may be entrusted to him: now if the said Davis R. Boogher shall pay or hand over all money belonging to said company which shall at any time be received by him, or for which he shall be liable, whether the same shall be or shall have been received by him personally and solely, or by, through, or together with any co-partner, co-agent, sub-agent, or other person, including all moneys so received prior to the date of this instrument (if any such there be), as well as that received thereafter, as also all moneys which he now owes or hereafter may owe said company, either on account of advances to him or otherwise, and shall faithfully discharge his duties as said agent, then this obligation shall be void, otherwise to remain in full force and effect. It being understood and agreed that this obligation shall not be annulled or revoked without the consent of the company, but shall be and remain in force so long as said Davis R. Boogher shall continue to be agent of said company, whether under his existing appointment or any future one, and whether such present or future agency be sole, or whether said Davis R. Boogher be joined with any other person or persons, and until all transactions under said agency shall have been finally adjusted or settled, and all liabilities of said Davis R. Boogher, by reason thereof, shall have been discharged."

Plaintiff further states that defendant, Davis R. Boogher, under the aforesaid appointment and under another appointment made on the 23rd
7 day of December, 1873 (which said contract of appointment is herewith filed and marked C), acted as agent for plaintiff, and for breach of said condition plaintiff states that said Davis R. Boogher has not faithfully discharged his duties as agent to plaintiff; that he has not paid or handed over to plaintiff all moneys belonging to plaintiff, which have been received by him or for which he is liable as said agent, and plaintiff avers that said defendant owes and is indebted to plaintiff in the sum of $1,400\frac{98}{100}$ for money received by him as agent of plaintiff as aforesaid and for which he is liable, and though often requested, he neglects and refuses to pay said sum or any part thereof. The items of which said indebtedness will appear from the account herewith filed and marked Exhibit D and made a part of this petition.

Plaintiff states that by reason of said breaches of said bond defendants have become liable to plaintiff in the said penalty of $5,000.00; that payment of the aforesaid indebtedness of said Davis R. Boogher has been demanded of them and they refuse to pay said sum or any part thereof.

Wherefore plaintiff asks judgment for the said penalty of $5,000.00, and that execution may issue for the sum of $1,400.98, with interest at rate of 7 per cent. from the 6th day of November, 1875.

By its attorney,

F. A. JUDSON.

Exhibit A, attached to petition.

This agreement, made this twenty-seventh day of October, in the year one thousand eight hundred and seventy-one, between the New York Life Insurance Company, party of the first part, and Davis R. Boogher, of St. Louis, in the county of St. Louis, and State of Missouri, party of the second part, witnesseth:

That the said parties, in consideration of the mutual covenants and agreements hereinafter mentioned, hereby mutually covenant and agree each with the other, as follows, to wit: That the said party of the first part doth hereby appoint the said party of the second part as agent of the said party of the first part, for the purpose of canvassing for
8 applications for assurance on the lives of individuals who shall be satisfactory to the said company, and for the purpose of collecting and paying over premiums on such assurance when effected, and of performing such other duties as may be required of the said party of the second part by the officers of the said company in connection therewith. This appointment is on the following terms and conditions, which are agreed to by each party hereto:

1st. The said agent shall act exclusively for the said New York Life Insurance Company, so far as to tender to it all risks obtained by him or under his control, and, as such agent, shall devote his entire time, talents, and energies to the business of said agency; in the conducting of which he shall be governed strictly by the instructions which he may receive, from time to time, from said company.

2nd. The said agent shall keep regular and accurate statements of all transactions for account of said company, and whenever required by said company, or its authorized agent, shall transmit to said company a report in detail, embracing every item of business done by or through him, and of all moneys collected by or through him for said company, and remit, or pay over, the ascertained balance to said company, to its office, in the city of New York, as hereinafter provided. Said agent agrees that all books of account, documents, vouchers, and other books or papers connected with the business of said company shall be the property of the company, and at any and all times open to said company, or its representative, and freely exhibited for the purpose of examination. And in case at any time, on account of any neglect of duty by the said agent, it shall be deemed necessary or expedient by said company to make an examination into the affairs of the agency hereby established, by an officer of the company, or its representative, then the traveling and other necessary expenses shall be borne by said agent.

3d. It is expressly agreed and understood that all moneys or securities received or collected for or on behalf of the company shall
9 be securely held by the said agent as a fiduciary trust, and shall be used by him for no personal or other purpose whatever, but be transmitted to the company in accordance with their instructions.

4th. Unless otherwise instructed, all collections made under this agreement by said agent shall be by him promptly paid over weekly to said company, and it is expressly stipulated and agreed between the parties hereto that in case the said agent shall withhold any funds, policies, or receipts belonging to said company, after such funds, policies, or receipts should have been reported upon and transmitted to the company, or if he shall withhold any funds, policies, or receipts after they shall have been demanded from him in writing, by said company, all claims whatsoever, accrued or to accrue under this agreement to said agent or his representatives, shall be forfeited to said company unconditionally;

but nothing herein shall be construed to affect any claims of said company on said agent. And in case the said agent fails to comply with any of the conditions, duties, and obligations under this agreement, then, and in every such case, the said company may, at its option, terminate this agreement without notice.

5th. The said agent has no authority on behalf of the company to make, alter, or discharge any contract, nor waive forfeiture, nor receive any moneys due, or to become due, to said company, except on policies and renewal receipts (signed by an officer of the company), sent to him for collection, or on written authority.

6th. The district within which said agent has permission to operate is the State of Missouri, to be under control of and in harmony with the branch office of the company at St. Louis, and it is agreed by said agent that at the option of the company he will assume all liability, responsibility, and expense of said branch office, and collect all renewal premiums of the company in said State, in consideration of a commission of one (1) per cent. on said renewal premiums, and of having control of the company's interests in said State.

The said agent shall cause the above-named district to be thoroughly and ably canvassed, and to this end shall have the right within said district to appoint subordinate agents, subject to the approval of said company, and to such rules and instructions as the said company may establish, and for whose fidelity and honesty he shall be responsible to the company; but said subordinate agents so appointed shall have no claims whatsoever against the said company for commissions or any other claims whatsoever. In case, however, of the termination of this contract, the said company may, and is hereby empowered to pay to such subordinate agents any commission or other remuneration which said agent shall have agreed to pay to such subordinate agents, and to offset against all claims under this contract such commissions or other remuneration so paid; but nothing herein mentioned shall be held or interpreted as binding upon said company so to do. And the said agent agrees to furnish to the said company a copy of every contract made with such subordinate agents at the time when such contracts are made and entered into. Should the amount of new assurances effected through the instrumentality of said agent in any portion of the district herein assigned, prove to be less than the officers of the said company shall, from time to time, deem sufficient, then the said company may at its option employ other agents in such portion of said district, without otherwise affecting this contract, and the agent hereby appointed shall have no claim for commissions on the business effected by such other agent or agents.

7th. The compensation to be allowed said party of the second part during his continuance as the agent of said company under this agreement, shall be a commission upon cash premiums which shall in each year be obtained, collected, paid to, and received by the company, on policies of insurance effected with said company by or through said agent, which commission shall be at and after the following rates:

On the ordinary premiums upon —	For the first year of assurance. Per cent.	For second, third, fourth, and fifth years of assurance. Per cent.
A. Whole life policies paid by more than ten annual premiums	Twenty-five.	Ten.
B. Whole life policies paid by ten annual premiums	Twenty-five.	Ten.
11 C. Endowment policies paid by twenty or more annual premiums	Twenty-five.	Ten.
D. Endowment policies paid by fifteen annual premiums	Fifteen.	Seven & one-half.
E. Endowment policies paid by ten annual premiums	Fifteen.	Seven & one-half.
F. Extra premiums for extra risks and privileges	Five.	Nothing.

Provided in all cases the assurant is not over sixty years of age. It is agreed that upon business done by said agent on the "Tontine plan" he shall be entitled to receive in classes A, B, & C, in addition to the rates above specified, a commission of two and one-half (2½) per cent. upon the original cash premiums, and upon classes D & E an additional commission of five (5) per cent. on original cash premiums, and two and one-half (2½) per cent. in 2d, 3d, 4th, & 5th years of assurance in said classes D & E.

Commissions upon premiums on all classes of policies not named in the preceding schedule shall be determined by the actuary of the company.

The said agent agrees to collect and promptly remit to said company all premiums upon policies not issued through his instrumentality as renewal receipts may be furnished him from time to time by the company, and shall receive as compensation therefor a fee of one per cent. upon the amount of such premiums so collected and remitted. When premiums upon policies of the said agent are not collected by said agent, one per cent. of such premiums shall be deducted from the commission to be allowed on said premiums.

Commissions under this agreement shall accrue only as said agent shall collect and pay over the premiums to and they are received by the company in cash.

When policies that have been issued are changed and an allowance made on the old policy which is applied to the payment of the new, no commissions shall be allowed on the amount thus transferred from the old to the new policy.

8th. The necessary expenses for medical examinations, for post-
12 age between the parties to this agreement, and for expressage upon documents and other things sent by said company to said agent, shall be paid by said company. The company will furnish the said agent such a supply of blanks and circulars as they shall deem reasonble to enable him to carry on business as agent as aforesaid. But the said company shall be liable to pay no charge other than as herein stated, or as shall hereafter be allowed by special written permission of said company. And the said agent shall promptly remit or pay over to said company as directed all moneys or securities collected or received by him, making such deductions only as are herein allowed.

9th. Said company may offset against any claims for commissions under this agreement any debt or debts due at any time by said agent to said company.

10th. This agreement shall continue for the term of five years, unless sooner terminated, as provided for herein, and shall go into effect from and after the first day of November, 1871.

11th. The said agent agrees to keep deposited with the company a

satisfactory bond for the faithful performance of this contract and of all duties pertaining to the agency.

12th. This agreement shall not be binding upon the company unless signed by their president or vice-president and countersigned by their actuary or superintendent of agencies.

13th. This agreement shall be considered strictly confidential by the said agent, and under no circumstances shall he mention the terms thereof to any person or persons, under penalty of forfeiture of the same and all benefits thereunder.

The renewal commissions specified in sect. 7, which have not accrued at the termination of the agency created by this agreement, shall as they accrue thereafter be passed to the credit of said agent, less the costs paid and incurred by the company for the collection of the renewals; provided, however, the termination of the said agency shall not be caused by malfeasance on the part of the said Boogher, but shall be in regular course, November 1st, 1876, or if prior thereto shall be with the assent of the company.

13 Either party hereto may terminate this agreement by giving to the other thirty days notice in writing to that effect, unless otherwise terminated by its own conditions.

In witness whereof the parties to this agreement have hereby subscribed the same and affixed their seals the day and year first above written.

MORRIS FRANKLIN, *President.* [SEAL.]
D. R. BOOGHER. [SEAL.]

Countersigned by—

WM. H. BEERS, *Actuary.* [SEAL.]
D. O'DELL, *Sup't of Agencies.* [SEAL.]

Exhibit B to petition.

Know all men by these presents, that we, Davis R. Boogher, of Saint Louis, in the county of Saint Louis, State of Missouri, as principal, and Jesse L. Boogher and Randell & Co., a firm composed of Rufus Randell and John B. Nowlan, as sureties, are held and firmly bound unto the New York Life Insurance Company, in the sum of five thousand dollars, lawful money of the United States of America, to be paid to the said company, its successors or assigns, to which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this twenty-second day of December, one thousand eight hundred and seventy-one.

The condition of this obligation is such that whereas the above bounden Davis R. Boogher has been appointed by said company as their agent for the purpose of procuring applications for life insurance, and performing such other duties in connection therewith as may be entrusted to him: Now, if the said Davis R. Boogher shall pay or hand over all moneys belonging to said company which shall at any time be received by him or for which he shall be liable, whether the same shall be or shall have been received by him personally and solely, or by, through, or together with any co-partner, co-agent, sub-agent or other person, including all moneys so received prior to the date of this

14 instrument (if any such there be), as well as that received thereafter, as also all moneys which he now owes or hereafter may owe said company, either on account of advances to him or otherwise, and shall faithfully discharge the duties as said agent, then this obliga-

tion shall be void, otherwise to remain in full force and effect. It being understood and agreed that this obligation shall not be annulled or revoked without the consent of the above named company, but shall be and remain in force so long as said Davis R. Boogher shall continue to be the agent of said company, whether under his existing appointment or any future one, and whether such present or future agency be sole or whether said Davis R. Boogher be joined with any other person or persons, and until all transactions under such agency shall have been finally adjusted and settled, and all liabilities of said Davis R. Boogher by reason thereof shall have been discharged.

DAVIS R. BOOGHER. [SEAL.]
JESSE L. BOOGHER. [SEAL.]
RANDELL & CO. [SEAL.]

STATE OF MISSOURI,
County of St. Louis, ss:

On this twenty-second day of December, in the year one thousand eight hundred and seventy-one, before me, the undersigned, Stewart Steele, a notary public resident in Saint Louis, duly appointed and qualified, personally appeared Davis R. Boogher, Rufus Randell and John B. Nowlan and Jesse L. Boogher, to me known to be the individuals described in and who executed the within obligation, and they severally acknowledged that they executed the same.

[SEAL.] STEWART STEELE.
Notary Public.

Exhibit C to petition.

This agreement, made this twenty-third day of December, in the year one thousand eight hundred and seventy-three, between the New
15 York Life Insurance Company, party of the first part, and Davis R. Boogher, of St. Louis, in the county of St. Louis, and State of Missouri, party of the second part, witnesseth:

That the said parties, in consideration of the mutual covenants and agreements hereinafter mentioned, hereby mutually covenant and agree each with the other as follows, to wit:

That the said party of the first part doth hereby appoint the said party of the second part as agent of the said party of the first part for the purpose of canvassing for applications for assurance on the lives of individuals who shall be satisfactory to the said company, and for the purpose of collecting and paying over premiums on such assurance when effected, and of performing such other duties as may be required of the said party of the second part by the officers of the said company in connection therewith. This appointment is on the following terms and conditions, which are agreed to by each party hereto:

1st. The said agent shall act exclusively for the said New York Life Insurance Company so far as to tender to it all risks obtained by him or under his control, and, as such agent, shall devote his entire time, talents, and energies to the business of said agency, in the conducting of which he shall be governed strictly by the instructions which he may receive from time to time from said company.

2d. The said agent shall keep regular and accurate statements of all transactions for account of said company, and whenever required by said company or its authorized agents shall transmit to said company a report in detail, embracing every item of business done by or through him, and of all money collected or received by or through him for said

company, and remit or pay over the ascertained balance to said company to its office in the city of New York, as hereinafter provided. Said agent agrees that all books of account, documents, vouchers, and other books or papers connected with the business of said company shall be the property of the company, and at any and all times open to said company or its representatives, and freely exhibited for the pur-
16 pose of examination. And in case at any time, on account of any neglect of duty by the said agent, it shall be deemed necessary or expedient by said company to make an examination into the affairs of the agency hereby established, by an officer of the company or its representative, then the traveling and other necessary expenses shall be borne by said agent.

3d. It is expressly agreed and understood that all moneys or securities received or collected for or on behalf of the company shall be security held by the said agent as a fiduciary trust, and shall be used by him for no personal or other purpose whatever, but be transmitted to the company in accordance with their instructions.

4th. Unless otherwise instructed, all collections made under this agreement by said agent shall be by him promptly paid over weekly to said company, and it is expressly stipulated and agreed between the parties hereto that in case the said agent shall withhold any funds, policies, or receipts belonging to said company, after such funds, policies or receipts should have been reported upon and transmitted to the company, or if he shall withhold any funds, policies or receipts after they shall have been demanded from him in writing by said company, all claims whatsoever accrued or to accrue under this agreement to said agent or his representatives shall be forfeited to said company unconditionally; but nothing herein shall be construed to affect any claims of said company on said agent. And in case the said agent fails to comply with any of the conditions, duties, and obligations under this agreement, then and in every such case the said company may at its option terminate this agreement without notice.

5th. The said agent has no authority on behalf of the company to make, alter, or discharge any contract, nor waive forfeitures, nor receive any moneys due or to become due to said company except on policies and renewal receipts (signed by an officer of the company) sent to him for collection, or on other written authority.

6th. The district within which said agent has permission to oper-
17 ate is the State of Missouri, to be under control of and in harmony with the branch office of the company at St. Louis, and it is agreed by said agent that at the option of the company he will assume all liability, responsibility, and expense of said branch office, and collect all renewal premiums of the company in said State, in consideration of a commission of one (1) per cent. on said renewal premiums, and of having control of the company's interests in said State.

The said agent shall cause the above-named district to be thoroughly and ably canvassed, and to this end shall have the right within said district to appoint subordinate agents, subject to the approval of said company and to such rules and instructions as the said company may establish, and for whose fidelity and honesty he shall be responsible to the company; but said subordinate agents so appointed shall have no claims whatsoever against the said company for commissions or any other claims whatsoever. In case, however, of the termination of this contract, the said company may and is hereby empowered to pay to such subordinate agents any commission or other remuneration which said agent shall have agreed to pay to such subordinate agents, and to

offset against all claims under this contract such commissions or other remuneration so paid, but nothing herein mentioned shall be held or interpreted as binding upon said company so to do. And the said agent agrees to furnish to the said company a copy of every contract made with such subordinate agents at the time when such contracts are made and entered into. The said company may at its option employ other agents in said district, and the agent hereby appointed shall have no claim for commissions or other remuneration on the business effected by such other agent or agents so employed.

7th. The compensation to be allowed said party of the second part during his continuance as the agent of said company under this agreement shall be a commission upon cash premiums which shall in each year be obtained, collected, paid to, and received by the company
18 on policies of insurance effected with said company by or through said agent, which commission shall be at and after the following rates :

On the ordinary premiums upon—	First year of assurance. Per cent.	Renewals. Per cent.
A. Whole life policies paid by more than ten annual premiums	Twenty-five (25).	Seven & one-half (7½).
B. Whole life policies paid by ten annual premiums	Twenty (20).	Seven & one-half (7½).
C. Endowment policies paid by twenty or more annual premiums	Twenty-five (25).	Seven & one-half (7½).
D. Endowment policies paid by fifteen annual premiums	Fifteen (15).	Seven & one-half (7½).
E. Endowment policies paid by ten annual premiums	Ten (10).	Seven & one-half (7½).
F. Extra premiums for extra risks and privileges	Five (5).	Nothing.

Provided in all cases the assurant is not over sixty years of age.

Commissions upon premiums on all classes of policies not named in the preceding schedule shall be determined by the actuary of the company.

When premiums upon policies of the said agent are not collected by said agent, the cost of collection shall be deducted from the commission to be allowed on said premiums.

Commissions under this agreement shall accrue only as said agent shall collect and pay over the premiums to, and they are received by, the company in cash.

When policies that have been issued are changed, and an allowance made on the old policy which is applied to the payment of the new, no commissions shall be allowed on the amount thus transferred from the old to the new policy.

8th. The necessary expenses for medical examinations, for postage between the parties to this agreement, and for expressage upon documents and other things sent by said company to said agent, shall be paid by said company. The company will furnish to said agent such a supply of blanks and circulars as they shall deem reasonable, to enable him to carry on business as agent as aforesaid. But the said company shall be liable to pay no charge other than as herein stated, or as shall hereafter be allowed by special written permission of said company. And the said agent shall promptly remit or pay over to said company as directed all moneys or securities collected or received by him, making such deductions only as are herein allowed.

19 9th. Said company may offset against any claims for commissions under this agreement any debt or debts due at any time by said agent to said company.

10th. The said agent agrees to keep deposited with said company a

satisfactory bond for the faithful performance of this contra't and of all duties pertaining to the agency.

11th. This agreement shall not be binding upon the company unless signed by their president or vice-president, and countersigned by their actuary or superintendent of agencies.

12th. It is expressly understood and agreed between the parties to this agreement that the same shall be considered strictly confidential, and under no circumstances shall the party of the second part mention or exhibit the terms thereof to any person or persons, under penalty of forfeiture of the same and all benefits thereunder.

13th. It is further agreed that upon the original (first years or parts thereof) cash premiums of business procured by said agent upon the ten year period of the tontine investment plan, he shall be entitled to an extra commission of two and one-half (2½) per cent., and upon the fifteen and twenty years periods of said plan an extra commission of five (5) per cent. above the rates before specified upon such premiums.

14. The commissions as above, subject to the stipulations and limitations herein contained, shall continue to be paid to the said agent, or in case of his death to his personal representatives, for the term of ten years from the date of each policy, provided he shall continue to act exclusively for said company for the term of five years; but in case said agent shall be discontinued for cause by said company, then all commissions which would accrue to him under this or any former contract shall be forfeited to said company unconditionally.

15th. This contract abrogates all former ones so far as new business is concerned.

Either party hereto may terminate this agreement, by giving to the other thirty days' notice in writing to that effect, unless otherwise terminated by its own conditions.

In witness whereof the parties to this agreement have hereby subscribed the same and affixed their seals the day and year first above written.

MORRIS FRANKLIN, *President.* [SEAL.]
DAVIS R. BOOGHER. [SEAL.]

Countersigned by—

WM. A. BEERS, *Actuary.* [SEAL.]
D. O'DELL, *Sup't of Agencies.* [SEAL.]

Attached to said contract is the following:

NEW YORK, *Dec.* 22, 1873.

It is understood between the New York Life Insurance Company and D. R. Boogher that the establishment of local boards of directors by said company has been and is for the accommodation and to the advantage of said D. R. Boogher, and that the commissions allowed by the said company to local boards of directors, established by or through said D. R. Boogher, are to come out of and to be deducted from the commissions allowed said D. R. Boogher under his contracts with said company under date of October 27, 1871, and December 23, 1873.

D. R. BOOGHER.

NEW YORK, *Dec.* 23, 1873.

D. O'DELL, Esq'r.,
Sup. Agencies, N. Y. Life.

DEAR SIR: You are hereby authorized to retain any renewal commis-

sions to which I may be entitled, and to apply the same toward the payment of my indebtedness to the company.

Yours, truly,

D. R. BOOGHER.

Exhibit D to petition.

Statement of moneys collected & retained & interest to Nov. 6th, 1875.

21 *D. R. Boogher, No. 2, in ac. with New York Life-Ins. Co.*

1872.					
M'ch 30.	To receipt for money, with int. from Dec. 12, '71, @ 7 p. c.			245 47	
1873.					
Oct. 22.	Int. 1 year, 364 d's, @ 7 p. c.				32 13
"	By comm's @ 5 p. c. on 1578, No. 88582, Smith.	7 85			
" "	" " " 285.60, No. 88583, Hastings.	14 28			
			22 13		
	Balance			$223 34	
28.	To interest 6 d's @ 7 p. c. on 223.34				26
"	By comm's 5 p. c. on 247.80			12 39	
	Balance			210 95	
Dec. 11.	To interest 44 d's @ 7 p. c. on 210.95				1 80
"	By comm's 5 p. c. on $161.58, No. 93564, Ulrice			8 07	
	Balance			$202 88	
15.	To interest 4 d's on 202.88				16
	By comm's 5 p. c. on $119.50, No. 87765, St. John	5 97			
"	" " 512.20, No. 94383, Sessinghaus	25 61			
"	" " 536.30, No. 94628 "	26 81			
			58 39		
	Balance			$144 49	
30.	To interest 15 d's on $144.49				45
	By comm's 10 p. c. " 337.20, 85862, Bruno	33 72			
"	" " " 106.10, 94301, White	10 61			
			44 33		
	Balance			100 16	
1874.					
Jan'y 29.	To int. 30 d's on $100.16				58
"	By comm's 10 p. c. 214.80, 75113, Weiss	21 48			
" "	" " 141.70, 86922, Boogher	14 17			
			35 65		
	Balance			64 51	
Feb'y 17.	To interest 17 d's on $6.451				24
	By comm's 10 p. c. on 29.15, 95697, Hennsen			2 91	
	Balance			61 60	
19.	To int. 2 d's on 61.60				02
"	By comm's 10 p. c. 313, 87167, Wallace			31 30	
	Balance			30 30	
M'ch 2.	To int. on $30 30 11 d's				06
"	By comm's 10 p. c. on $309.30, 87394, Houston			20 93	
	Balance			9 37	
7.	To int. 5 d's on $9.37, 7 p. c				
1873.					
Oct. 5.	" note interest from date @ 10 p. c			1,000 00	
1874.					
M'ch 7.	" interest on $1,000 150 d's at 10 p. c				41 67
	Amount			1,009 37	
"	By comm's 10 p. c. on $281.70, No. 86621 Boogher			28 17	
	Forward			981 20	77 37

22

23

1874.					
M'ch. 17.	To amount forward			$981 20	77 37
"	12. " interest 5 d's on $981.20 10 p. c				1 36
	By comm's, 10 p. c., $313.00, No. 88604, Cupples			31 30	
	Balance			$949.90	
18.	To interest 6 d's on $949.90 10 p. c				1 58
	By comm's ,10 p. c., on $255.60, 98312, Scott			25 56	

		Balance		$894 34	
	19.	To interest, 10 p. c., on $894.34, 1 day, 10 p. c			25
		By comm'a, 10 p. c., on 296.40, 98329, Beall	29 64		
		" " " 74.10, 98330, "	7 41		
				37 05	
		Balance		$857 29	
April	1.	To interest on $857.29, 13 d'a, 10 p. c			3 20
		By comm'a, 10 p. c., on $204.05, 88640, Tansey		20 40	
		Balance		836 89	
	6.	To interest on $836.89, 5 d'a, 10 p. c			1 20
		By comm'a, 10 p. c., on $294.45, 88403, Teiahman		29 54	
		Balance		$837 35	
	15.	To interest on $837.35, 9 d'a, 10 p. c			2 10
		By comm'a, 10 p. c., $337 20, 88561, Hase	$33 72		
		" " " 157.00, 88582, Smith	15 70		
		" " " 285.60, 88583, Hasting	28 56		
		" " " 272.50, 88641, Franklin	27 25		
				105 23	
		Balance		$732 12	
	18.	To interest on $732 12, 3 d'a, 10 p. c			61
		By comm'a, 10 p. c., on $363.80, 88712, Larimore	36 38		
		" " " " 281.70, 88713, "	28 17		
				54 55	
		Balance		$677 57	
	24.	To interest on $677.57, 6 d'a, 10 p. c			1 13
		By comm'a, 10 p. c., on 96 60, 88404, Gray		9 66	
		Balance		667 91	
May	1.	To interest on $657.91, 7 d'a, 10 p. c			1 30
		By comm'a, 10 p. c., 301.90, 97962, Evans	30 19		
		" " " 255.60, 89041, Seigel	25 56		
				55 75	
		Balance		612 16	
	2.	To interest on $612.16, 1 day, 10 p. c			17
		By comm'a, 10 p. c., $204.00, 90031, Kem		20 40	
		Balance		591 76	
	20.	To interest on $591.76, 18 d'a, 10 p. c			2 96
		By comm'a, 10 p. c., $379.70, 89401, Nansen		37 97	
				553 79	
	23.	To interest on $553.79, 3 d'a, 10 p. c			46
	"	By comm'a, 10 p. c., on 161.58, 93564, Ulrice		16 15	
		Balance		537 64	
June	13.	To interest on $537 64, 21 d'a, 10 p. c			3 14
		By comm a, 10 p. c., $102.00, 98633, Deitz		10 20	
		Balance forward		527 44	96 84
24					
25		1874.			
		June 13. To amount forward		527 44	96 84
	19.	" interest on $527.44, 6 d'a, 10 p. c			88
		By comm'a, 10 p. c., 281.70, 99033, Booth	28 17		
		" " " 90.57, 99073, Strauss	9 05		
				37 22	
		Balance		$490 22	
	20.	To interest on $490 22, 10 p. c			14
		comm'a, 10 p. c., 120.10, 99037, Butler		12 01	
		Balance		$478 21	
July	1.	To interest on 478.21, 11 d'a, 10 p. c			1 46
		comm'a, 10 p. c., " 36.10, 99635, Seebold	3 61		
		" " 36.10, 99636, "	3 61		
				7 22	
		Balance		$470 99	
	3.	To interest on $470.99, 2 d'a, 10 p. c			26
		comm'a, " 106.10, 94301, White	10 61		
		" " 204. 90031, Kem	20 40		
				31 01	
		Balance		$439 98	
	9.	To interest on $439.98, 6 d'a, 10 p. c			73
		comm'a, 10 p. c., " 55.85, 99421, Wesson	5 58		
		" " 55.85, 99472, "	5 58		
				11 16	
		Balance		$428 82	

	11. To interest on $428.62, 2 d's, 10 p. c.				24
	comm's, 10 p. c., on 313.00, 99351, Smith			31 30	
	Balance			$397 52	
	18. To interest on $397.52, 7 d's, 10 p. c.				78
	comm's, 10 p. c., " 471.80, 99363, Ashbrook	47 18			
	" " " 96.60, 88404, Gray	9 66			
				56 84	
	Balance			$340 68	
	25. To interest on $340 68, 7 d's, 10 p. c.				66
	comm's, 10 p. c., " 5.28, 99368, Shanar	52			
	" " 490.20, 99240, Ring	49 02			
				49 54	
	Balance			$291 14	
	27. To interest on $291.14, 2 d's, 10 p. c.				09
	comm's, 10 p. c., " 150.95, 21219, Howingstein			15 09	
	Balance			$276 05	
	28. To interest on $276.05, 1 day, 10 p. c.				08
	comm's, 10 p. c., " 15.84, 99923, March	1 58			
	" " " 87.45, 99267, Lowenstein	8 74			
				10 32	
	Balance			$265 73	
Aug.	11. To interest on $265.73, 14 d's, 10 p. c				1 03
	comm's, 10 p. c., " 23.35, 100214, Franck			2 33	
	Balance			$263 40	
	17. To interest on $263.40, 6 d's, 10 p. c.				44
	comm's, 10 p. c., " 149.37, 91600, Fisher	14 93			
	" " 135.70, 91601, "	13 57			
	" " 79.14, 91602, "	7 91			
	" " 52.76, 91603, "	5 27			
				41 68	
	Balance			$221 72	
	19. Interest on 221.72, 2 d's, 10 p. c.				12
	Comm's, 10 p. c., " 233.50, 100347, Nenan	23 35			
	" " " 220.70, 90165, Mastbrook	22 07			
				45 42	
	Balance forward			176 30	103 75
26					
27	1874.				
	Aug. 19. To balance forward			176 30	103 75
	25. " interest on 176.30 6 d's, 10 p. c				29
	By comm's, 10 p. c., " 141.70, 88622, Boogher			14 17	
	Balance			$162 13	
	Sept. 1. To interest on $162.13, 12 d's, 10 p. c				54
	By comm's, 10 p. c., " 406.00, 92201, Ferguson	40 60			
	" " " 53.05, 87362, White	5 30			
				45 90	
	Balance			$116 23	
	7. To interest on $116 23, 6 d's, 10 p. c				19
	By comm's, 10 p. c., " 471.80, 92508, Ashbrook			47 18	
	Balance			$69 05	
	19. To interest on $69.05, 12 d's, 10 p. c				23
	By comm's, 10 p. c., " 296.40, 92329, Beall	29 64			
	" " " 74.10, 92330, "	7 41			
				37 05	
	Balance			$32	
	20. To interest on 32.00, 1 day				01
	By comm's, 10 p. c., " 120.10, 99037, Butler			12 01	
	Balance			19 99	
Oct.	1. To interest on $19.99, 11 d's, 10 p. c				06
	By comm's, 10 p. c., " 36.10, 99636, Seebond	3 61			
	" " " 36.10, 99635, "	3 61			
				7 22	
	Balance			$12 77	
	3. To interest on 12.77, 2 , 10 p. c.				01
	By comm's, 10 p. c., " 52.62, 101245, Shaw			5 26	
	Balance			$7 51	

1873.					
	22.	To interest on $7.51, 19 d's, 10 p. c.			04
Dec.	16.	To cash		1,088 94	
Oct.	22.	interest on $1,093.24, 310 d's, 7 p. c.			61 97
				$1,035 75	
	22.	By comm's, 10 p. c., on 96.50, 88404, Gray	9 66		
		" " " 157.00, 88582, Smith	15 70		
				25 36	
		Balance		$1,010 39	
	26.	To interest on $1,010 39, 4 d's, 7 p. c.			78
		By comm's " 247.80, 94627, Kupferle		94 78	
		Balance		$985 61	
	29.	To interest on $985.61, 3 d's, 7 p. c			55
		By comm's, 10 p. c., " 15.84, 99923, Marib	1 58		
		" " " 150.95, 102046, Hoffman	15 10		
				16 68	
		Balance		$968 93	
Nov.	13.	To interest on $969.93, 15 d's, 7 p. c			2 82
		By comm's, 10 p. c., 36.10, 100174, Wilhite		3 61	
	13.	Balance		$965 32	
	23.	To interest on $965.32, 10 d's, 7 p. c			1 88
		By comm's, 10 p. c., " 161.58, 93564, Ulrici		16 15	
		Balance		$949 17	173 12
28					
29		1874.			
	Nov. 23.	To amounts forward		949 17	173 12
Dec.	9.	To interest on $949.17, 16 d's, 7 p. c			2 96
		By comm's 10 p. c 94.93, 102728 Spannagle		9 49	
		Balance		939 68	
	15.	To interest on $939.68, 6 d's, 7 p. c			1 10
		By comm's 10 p. c. $536.30, 94628, Sessinghaus		53 63	
		Balance		$886 05	
	18.	To interest on $886 05, 3 d's, 7 p. c			51
		By comm's 10 p. c on 106.10, 94301, White		10 61	
		Balance		$875 44	
	31.	To interest on $75.44, 13 d's, 7 p. c			2 21
		By comm's 10 p. c., on 120.10, 99037, Butler	12 01		
		" " " " 512.90, 94302, Sessinghaus	51 22		
				63 23	
		Balance		$812 21	
1875.					
Jan'y	1.	To interest on $812.21, 1 day, 7 p. c.			16
		By comm's 10 p. c. on 337.20, 85862, Brown	33 72		
		" " " " 36.10, 99635, Seebold,	3 61		
		" " " " 36.10, 99636, "	3 61		
				40 94	
		Balance		$771 27	
	7.	To interest on $771.27, 6 d's, 7 p. c			90
		By comm's 10 p. c., 55.85, 99420, Wesson	5 58		
		" " " on 55.85, 99421, "	5 58		
				11 16	
		Balance		$760 11	
Feb'y	1.	To interest on $760.11, 25 days, 7 p. c.			3 70
		Comm's " 15.84, 99923, March	1 58		
		" " 141.70, 86622, Boogher	14 17		
		" " 36.10, 100174, Welhite	3 61		
				19 36	
		Balance		$740 75	
	2.	To interest on $740.25, 1 day, 7 p. c			15
		Comm's 10 p. c., on 214.80, 95113, Weiss	21 48		
		" " 281.70, 86621, Boogher	28 17		
				49 65	
		Balance		$691 10	
	19.	To interest on $691.10, 17 d's, 7 p. c			2 22
		comm's, 10 p. c., 313.00, 87167, Wallace		31 30	
		Balance		$659 80	
	20.	To interest on $659.80, 4 d's, 7 p. c			51
		comm's 10 p. c., 209.30, 93394, Houston		20 93	
		Balance		$638 87	

M'ch	1. To interest on $638.87, 6 d's, 7 p. c.				82
	comm's 10 p. c., 225.60, 98312, Scott		25 56		
	Balance		$613 31		
	13. To interest on $613.31, 12 d's, 7 p. c.				1 43
	comm's " 313.00, 86604, Cupples		31 30		
	Balance forward		$582 01	$189 85	
30					
31	1875.				
	M'ch 13. To amounts forward		$582 01	189 85	
	19. To interest on $582.01, 6 d's, 7 p. c.				68
	By comm's 10 p. c. on 296.40, 92329, Bealls	29 64			
	" " " " 74.10, 92330, "	7 41			
			37 05		
	Balance		$544 96		
	20. To interest on $544.96, 1 d., 7 p. c.				11
	comm's 10 p. c., on 120.10, 99037, Butler		12 01		
	Balance		$532 95		
	27. To interest on $532.95, 7 d's, 7 p. c.				73
	comm's, 10 p. c., on 53.05, 87362, White		5 30		
	Balance		$527 65		
Apr.	1. To interest on $527.65, 5 d's, 7 p. c.				51
	comm's, 10 p. c., 36.10, 99635, Seebold	3 61			
	" " 36.10, 99636, "	3 61			
			7 22		
	Balance		$520 43		
	5. To interest on $520.43, 4 d's, 7 p. c.				41
	comm's, 10 p. c., on 204.05, 88640, Tansey	20 40			
	" " " 272.50, 88641, Franklin	27 25			
			47 65		
	Balance		$472 78		
	6. To interest on $472.78, 1 day, 7 p. c.				10
	comm's, 10 p. c., on 295 45, 88403, Teichman	29 54			
	" " " 337.20, 88581, Hase	33 72			
			63 26		
	Balance		$409 52		
	12. To interest on $409.52, 6 d's, 7 p. c.				42
	comm's, 10 p. c., on $157.00, 88582, Smith		15 70		
	Balance		$393 82		
	30. To interest on $393.82, 18 d's, 7 p. c.				1 38
	comm's, 10 p.c., on 36.10, 100178, Wilhite		3 61		
	Balance		$390 21		
May	1. To interest on $390.21, 1 day, 7 p. c.				09
	comm's, 10 p. c., on 15 84, 99923, March	1 58			
	" " " 301.90, 97962, Evans	30 19			
			31 77		
	Balance		$358 44		
	31. To interest on $358.44, 30 days, 7 p. c.				2 09
	comm's, 10 p. c., on 255 60, 89041, Seigel		25 56		
	Balance		$332 88		
June	4. To interest on $332.88, 4 d's, 7 p. c.				26
	comm's, 10 p. c., 102.00, 98633, Deitz		10 20		
	Balance		$322 68		
	5. To interest on $322.68, 1 day, 7 p. c.				06
	comm's, 10 p. c., 263.80, 88712, Larimore	26 38			
	" " " 281.70, 88713, "	28 17			
			54 55		
	Balance forward		$268 13	$196 74	
32					
33	1875.				
	June 5. To amounts forward		268 13	196 74	
	8. To interest on $268.13, 3 d's, 7 p. c.				16
	" comm's, 10 p. c., on 281.70, 90033, Booth		28 17		
	Balance		$239 96		
	21. To interest on $239.96, 13 d's, 7 p. c.				61
	comm's, 10 p. c., $120.10, 99037, Butler		12 02		
	Balance		$227 95		
	23. To interest on $227.95, 2 d's, 7 p. c.				08
	comm's, 10 p. c., on $106.10, 94301, White		10 61		
	Balance		$217 34		

	29. To interest on $217.34, 6 d's, 7 p. c				25
	comm's, 10 p. c., on 161.58, 93563, Ulrice			16 15	
	Balance			$201 19	
	30. To interest on $201.19, 1 day, 7 p. c				04
	comm's, 10 p. c., on 90.57, 99073, Strauss		9 05		
	" " " " 87.45, 99257, Lowenstein		8 75		
				17 80	
	Balance			$183 39	
July	1. To interest on $183.39, 1 day, 7 p. c				04
	comm's, 10 p. c., on 36.10, 99635, Seebold		3 61		
	" " " 36.10, 99636, "		3 61		
				7 22	
	Balance			$176 17	
	12. To interest on $176.17, 11 days, 7 p. c				37
	comm's, 10 p. c., on 55.85, 99421, Wasson		5 58		
	" " " 55.85, 99422, "		5 58		
				11 16	
	Balance			$165 01	
	17. To interest on $165 01, 5 d's, 7 p. c				16
	comm's, 10 p. c., on 471.80, 909630, Ashbrook			47 18	
	Balance			$117 83	
	24. To interest on $117.83, 7 d's, 7 p. c				16
	comm's, 10 p. c., on 214.80, 95113, Weiss			21 48	
	Balance			$96 35	
	29. To interest on $96.35, 5 d's, 7 p. c				09
	comm's, 10 p. c., on 141.70, 86622, Boogher			14 17	
	Balance			$82 18	
Aug.	5. To interest on $82.18, 7 d's, 7 p. c				11
	comm's, 10 p. c., on 15.84, 99923, March			1 58	
	Balance			$80 60	
	10. To interest on $80 60, 5 d's, 7 p. c				09
	comm's " 23.35, 100124, Franck			9 33	
	Balance forward			$78 27	198.89
34					
35	1875.				
	Aug. 10. To amounts forward			$78 27	198 89
	17. To interest on 78.27, 7 p. c., 7 d's				10
	" comm's, 10 p. c., on 149.37, 91600, Fleber		14 93		
	" " " " 135.70, 91601, "		10 17		
	" " " " 79.14, 91602, "		7 91		
	" " " " 52.76, 91603, "		5 27		
	" " " " 36.10, 100174, Wilhite		3 61		
				41 89	
	Balance			36 38	
	18. To interest on $36.38, 1 day, 7 p. c				01
	comm's, 10 p. c., on 233.50, 100347, Nenen			23 35	
	Balance			$13 03	
Sept.	1. To interest on 13 03, 14 d's, 7 p. c				03
1874.					
Dec.	18. " cash			417 21	
1875.					
Sept.	1. interest on 417.21, 257 d's, 7 p. c				20 84
	balance			$130 24	
	comm's, 10 p. c., on 406.00, 92201, Ferguson			40 60	
	Balance			$389 64	
	3. To interest on $389.64, 2 d's, 7 p. c				15
	comm's " 150.95, 91219, Levington			15 09	
	Balance			$374 55	
	18. To interest on $374.55, 15 d's, 7 p. c				1 31
	comm's, 10 p. c., on 296 40, 92329, Beall		29 64		
	" " " 74.10, 92530, "		7 41		
				37 05	
	Balance			$337 50	
	20. To interest on $337.50, 2 d's, 7 p. c				13
	comm's, 10 p. c., 130.10, 99037, Butler			12 01	
	Balance			$325 49	

Oct.	2.	To interest on $325.49, 12 d's, 7 p. c			75
		comm's, 10 p. c., on 36.10, 99635, Seebold	3 61		
		" " " 36.10, 99636, "	3 61		
				7 22	
		Balance		$318 27	
	11.	To interest on $318.27, 9 d's, 7 p. c			56
		comm's, 10 p. c, $157.00, 86582, Smith		15 70	
		Balance		$302 57	
	23.	To interest on $302.57, 12 d's, 7 p. c			71
		comm's, 10 p. c., on 5.28, 99266, Sharron		53	
		Balance		$302 04	
1877.					
Nov.	6.	To interest on $302.04, 14 d's to date, 7 p. c			81
May	21.	" cash		160 78	
		" interest to Nov. 6, 169 d's, 7 p. c			95
June	1.	" cash		42 89	
		" interest " " 158 " 7 p. c			1 32
	17.	" cash		554 11	
		" interest " " 142 " "			15 30
				$1,079 82	
		Total interest		246 86	246 86
				$1,326 68	

36

37 *General ledger.—Exhibit E.*

D. W. Roogher in account with New York Life Ins. Co., Dr.

1872.					
Feb.	29	To cash com's 5 p. c. on $142.70, pol. No. 86622, Boogher			7 08
		" " " 5 p. c. " 314.00, " 87167, Wallace			15 65
M'ch	4	" " " 5 p. c. " 210.37, " 87894, Houston			10 46
	9	" " " 5 p. c. " 423.55, " 86621, Boogher			21 12
	30	" " borrowed			50
		" " "			29 30
April	1	" "			5
June	6	" " refunded to Mr. Hill for return of Blake's pol. to home office			5
1873.					
Feb.	15	" com's 10 p. c. $337.20, No. 85862 Brown			
		" " " 10 p. c. " 141.70, 85622, Boogher			
		" " " 10 p. c. " 422.55, 86621, do.			146 54
		" " " 25 p. c. " 225.60, 94619, Finny			
M'ch	22	" " " 5 p. c. " 370.50 { 92329 / 92330 } Beall			18 52
	26	" " " 5 p. c. " 104.90, 94268, Keach			5 24
	27	" Graham's note $58.00 & protest 2.25			60 25
April	12	" "			15
	15	" "			10
	"	" " borrowed money payable on demand			1 50
	"	" " " " " "			100
	"	" " " " " "			162 10
May	7	" " The Tunis bill			6
	8	" "			20
	28	" "			45 72
	"	" com's 26 p. c. on $189.60 { 91728 / 97729 } Leftinch			47 40
June	5	" " " 27½ p. c. 163.50, 93536, Hogan			28 46
	"	" " " 10 p. c. " 754.90, 89283, Lavielle			75 49
	9	" " " 25 p. c. " 260.60, 94066, Tisser			65 15
	10	" " " 10 p. c. " 281.70, 90013, Booth			28 17
	20	" " " 27½ p. c. " 301.90, 97962, Evans			83 02
	"	" " " 25 p. c. " 58.50, 94652, Colcord			14 62
	27	" " "			11 83
	28	" " " 10 p. c. on 220.70, No. 90165, Masterbrook			22 07
	"	" " " 25 p. c. " 106.10, 94301, White			26 52
	"	"			22
	30	" " 25 p. c. " 102.00, 98631, Dietz			25 50
July	12	" " 25 p. c. " 6.77, 98288, Birt			1 69
		Am't forward			1,334 90

38

39

		Am't bro't forward			1,334 90
1873.					
July	12	To cash com's 25 p. c. on $58.96, 98351, Ownes			14 74
		" " " 27½ p. c. " 88.45, 99267, Lowenstein			24 32
		" " " 27½ p. c. " 93.90, 98073, Strauss			25 82
		" " " 10 p. c. " 150.75, 91219, Lowenstein			15 09
	14	" " " 27½ p. c. " 5.28, 99268, Shanan			1 45

	22	To cash com's 25 p. c. on 120.10, 99037, Butler		30 02
		" " " 25 p. c. " 255.60, 98312, Scott		63 90
		" " " 25 p. c. " 22.10, 99490, Kirk		5 67
		" " " 10 p. c. " 119.50, 87765, St. John		11 95
	25	" " " 25 p. c. " 225.60, 94619, Finney		56 40
		" " " 10 p. c. " 471.80, 98863, Ashbrook		47 18
		" " " 25 p. c. " 214.80, 95113, Weiss		53 70
	31	" " over cr. on 93.90, 99073. Strauss should be 90.57. See entry July 19th		92
		" " over cr. on 88.45, 99267. Lowenstine should be 87.45		98
		91600		
		601		
		602		
		603		
Aug.	20	Cash com's 10 p. c. on 46.97 Fisher		41 69
	30	" " on ⅔ White & K.'s note		20 94
		" " for return of Orthmire & Kenneth		10
		" " com's 27½ p. c. on 313.00, 98898, Doyle		86 07
		" " his ½ of premium of Mr. Ormerod		21 38
		" " com's 25 p. c. on $57.00, No. 97616, Ormerod		14 25
Sept.	13	" " premiums on Clark's, Fallis' & Organ's pol's		44 60
	15	" " " " Sebold's policies		74 62
	17	" " " " Birt's "		6 77
	22	" " com's 5 p. c. $120.10, No. 99037, Butler		6 00
		" " premium on Wasson's policies		113 70
	30	" New York Life, return of pol. 99434, Martin		5
		" cash for 2 policies returned		10
		" " 2½ difference in com's on $135.70, Fisher, 7½, not 10 p. c		3 30
Oct.	21	" cash		92
		" " loan'd		34 75
		" "		50
	22	" D. R. Boogher 5 p. c. on { 554.00, No. 88583, Smith / 285.60, No. 88383, Hasting }		21 13
	28	" cash com's 10 p. c. on 247.80, No. 94627, Kupferle		24 78
		" D. R. Boogher 5 p. c. on 247.80		12 39
		Am't forward		2,349 80
40				
41		Am't brought forward		2,349 80
1873.				
Oct.	28	To cash com's on 15.84, No. 99923, Marsh		
		" " " " 21 22, 983, Stamm		
		" " " " 82.90, 984, Williams		
		" " " " 32.85, 100113, Shelton		
		" " " " 7.92, 114, Prust		
		" " " " 11.40, 115, Ilse		146 76
		" " " " 11.70, 101097, Lambuson		
		" " " " 313.00, 99351, Smith		
		" " " " 490.20, 840, King		
		" " 25 p. c. on $987.03		
Nov.	19	" " premium on Frank's pol		24 61
	29	" com's 25 p. c. on 11.70, 101097, Lawbuson. Reported in error		2 92
		" New York Life return 2 pol's, Boogher		10
Dec.	22	" cash com's 5 p. c. on 120.10, No. 99037, Butler		6
	29	" cash		112 10
	31	" " com's 5 p. c. on $161.58, No. 93564, Ulrice		
		" " " " " 119.50, 87765, St. John		
		" " " " " 512.20, 94383, Sessingham		66 46
		" " " " " 536.30, " 628, do		
		3,129.58 @ 5 p. c.		
		" cash premium on Bert's pol		6 77
		" " p'd T. E. White pol. No. 94301		5
		" " Eland		20
		" " com's 00 p. c. on 337.20, No. 85962, Brown		33 92
		" " " 10 p. c. " 106.10, 94301, White		10 61
1874.				
Jan.	12	" " " 25 p. c. " 111.70 { 99421 / 422 } Wasson		27 92
		" " " 25 p. c. " 72.20 { 99635 / 636 } Seebold		18 05
		" cash		20
Feb.	13	" "		2
	14	" "		60
	17	" " 1 copy ins. law		1
M'ch	7	" "		200
	14	" "		5
	18	" " com's 2 p. c. on $255.60, 98312, Scott		5 11
	20	" " " 5 p. c. on $120.10, 99037, Butler		6
	21	" " Mitchell's premium on pol. 104342		7 37
		Am't forward		3,248 20
42				
43		Am't bro't forward		3,248 20
1874.				
M'ch	21	To cash Wilhite's premium pol. 100174		36 12

	26	To cash com's 5 p. c. on $131.90, 109672, Welge		6 59
Ap'l	6	" "		10
	8	" "		12
	10	" " 1 copy ins. law		1
	29	" N. Y. Life, return of pol. 102449, Favonte		5
May	2	" cash com's 25 p. c. on 27.75, No. 105065, Morris		6 93
		" " " 27 p. c. " 23.35. 105064, Howe		6 42
		" " " 30 p. c. " 99.45, 104944, Phillips		29 83
		" " " 30 p. c. " 209.00, 105500, Taussig		61 20
	5	" " " 25 p. c. " 15.84, 99923, March		3 96
	13	" "		16
		" " com's 5 p. c. on 329.35 {No. 105192 / 105739} Bain & Welge		16 46
	26	" " " 27½ p. c. " 384.70, 106188, Tiechmann		89 29
June	1	" cash		5
		" " hat		1
	4	" " com's 25 p. c. on $471.80, 106129, Ashbrook		117 95
	10	" "		5
	13	" " com's 30 p. c. on $477.45 {105682 / 106372} Bloess		143 23
		" " " 30 p. c. " 63.90, 108555, Luding		19 12
	16	" " " 25 p. c. " 53.30, 105261, Boogher		13 32
		" cash		5
	30	" New York Life, return of pol. {109505, Burnett, / 109223, Davis, }		10
July	1	" cash		10
		" " com's 2 p. c. to Seebold on 72.20		1 44
	3	" " " 2 p. c. " White " 106.10		2 12
	7	" " " 27½ p. c. on $182.36, No. 4106768, Traube		50 13
	11	" " " 30 p. c. " 198.90, 107003, Bremineman		59 67
	18	" "		5
	20	" " Hill's check		70
	28	" " com's 25 p. c. on $120.25, No. 106554, Edgerly		30 06
Aug.	1	" " " 25 p. c. " 36.10. 100174, Wilhite		9 02
	15	" " " 30 p. c. " 67.35, 105192, Bain		20 20
	17	" " " 2 p. c. " 416.97. allow'd Fihn (2 y'rs)		16 64
	19	" " " 2 p. c. 233.50, Manen		4 67
		" " " 2 p. c. $189.90 allow. Masterbrook		3 75
	31	" " "		2 00
		Am't forward		4,153 29
44				
45		Am't bro't forward		4,153 29
1874.				
Sept.	7	To cash about on Gowld's premium, No. 105224		9 58
	10	" "		10
	15	" " com's 30 p c. on 63.30, No. 104555, Luding		19 11
		" " " 25 p. c. " 53.20, 107962, Jackson		13 42
	21	" " " 2 p. c. p'd Butler on 120.10 for June, J., Sept		4 34
	26	" cash		10
	30	" New York Life return of pol., 106898, Walker		5
Oct.	2	" cash com's 2 p. c. on 72.10 to Seebold		1 44
	6	" "		2
	8	" "		100
	31	" " com's 5 p. c. on 67.35 to Bain, No. 105192		3 36
		" N. Y. Life return a pol., 107437, Williams		5
Nov.	30	" " " " " " 108063, Bryan		5
Dec.	18	" cash com's 2 p. c. on $106 10 to White		2 12
	22	" " " 2 p. c. " 120.10 " Butler		2 40
1875.				
Jan.	1	" N. Y. Life return of pol., 109058, Collins		5
	25	" cash short on Schlossstine's premium		90 15
		" "		8
	30	" " com's allowed Bain No. 105192		2 35
Feb.	2	" " " 2 p. c. on 214 80, No. 95113, Wiess		4 29
		" " " 2 p. c. " 281.70, 88621, Boogher, 2 years		11 26
	21	" am't short on Schlossstine, premium		40
	17	" missed from drawer {Dec. 28, '74, 5.00 / Jan. 6, '75, 5.00 / " 8, '75, 3 00}		13
	19	" com's 2 p. c. on $313.00 to Wallace for 3 years		18 76
		" cash		2
March	1	" " com's 2 p c. on 255.60, Scott		5 11
	3	" " " 30 p. c. on 111.63, No. 110228, Gaetz / 101336, Weurpel		33 48
		" " " 25 p. c. " 52.45, 110191, Ready		13 11
		" " " 20 p. c. " 112.48, 110503, Wangler		22 49
	5	" " 3 medical examinations, Griesedieck		9
	20	" " com's 2 p. c. on 120.10, No. 99037, Butler		2 40
	31	" cash (borrowed) Feb. 26, '75		30
		" " " March 25, '75		2
		" " " 29, '75		5
April	6	" " on 295.45, No. 88403, Teichmann		25 35
	30	" Ap'l 23, '75		5
		Am't forward		4,493 81

47		Am't bro't forward		4,693 81
1875.				
May	7	To cash com's 2 p. c. on 67.35, No. 105192, Bain		1 35
	"	" " interest on 67.35, Bain, past due		58
June	5	" " am't short on Lemmons' pr'm		10 17
	23	" " com's 2 p. c. on 106.10, No. to White		2 12
	30	" " short on Buellet's premi'm		94
	"	" N. Y. Life return of Trisler's policy		5
July	1	" cash com's 2 p. c. on 72.20, Selbold		1 44
	27	" " 2 p. c. " 214.80, 95113, Weiss		4 30
Aug.	4	" " short on Orthruin's premi'm		1
	7	" " c'k on German B'k, note good		20
	12	" " com's 2 p. c. on 67.35, No. 105192, Bain		1 35
	17	" " " 2 p. c. " 416.97 {91600, 601, 602, 603} Fisher		8 34
	18	" " " 2 p. c. " 233.50, Vewen		4 67
Sept.	2	" " " 2 p. c. " 255.60. No. 107830, Paul, jr		5 11
Oct.	2	" " " 2 p. c. " 72.20 Sebold		1 94
		Total		4,761 30
		Balance due New York Life as p'r credit statement		74 30

48, 49

GENERAL ⅜ CREDIT.

D. R. Boogher in ⅜ with New York Life Ins. Co., Cr.

1872.				
June	29	By cash		50
July	5	" "		5
Aug.	31	" "		5
1873.				
Jan'y	13	" being com's @ 25 p. c. on 98.50, Graham. 2 y'rs		14 94
	15	" com's @ 10 p. c. on 337.20, pol. No. 85862, Brown		33 72
Feb.	4	" " " 10 p. c. on 422.55, pol. No. 86621, Boogher		42 25
	"	" " " 10 p. c. " 141.70 " 86622, do.		14 17
	15	" cash bill for 805 copies Boogher vs. Life Asso'n		25
	"	" com's @ 25 p. c. on 225.60, Frimey, No. 94619		56 40
	20	" " " 10 p. c. " 313.00, No. 87167, Wallace		31 30
	"	" " " 10 p. c. " 209.30, 87394, Houston		20 93
M'ch	12	" " " 10 p. c. " 313.00, 88604, Cupples		31 30
	13	" " " 10 p. c. " 425.60, 87763, Goodfellow		42 56
	14	" " " 10 p. c. " 179.50, 87765, St. John		11 95
	21	" " " 10 p. c. " 73.25, 87166, Crowell		7 32
	22	" " " 25 p. c. " 296.40, 92329, Beall		74 10
	"	" " " 25 p. c. " 74.10, 92330, do		18 52
	26	" " " 25 p. c. " 104.90, 94268, Keach		26 22
	31	" " " 10 p. c. " 53.03, 87369, White		5 30
	"	" " " 25 p. c. " 29.15, 95697, Hemison		7 28
April	5	" " " 10 p. c. " 295.45, 88403, Teichmann		29 54
	1	" " " 10 p. c. " 204.05, 88640, Tousey		20 40
	11	" " " 10 p. c. " 337.20, 88581, Huse		33 72
	"	" " " 10 p. c. " 157.00, 88582, Smith		15 70
	"	" " " 10 p. c. " 285.60, 88583, Hastings		28 56
	19	" " " 10 p. c. " 263.80, 88712, Larriman		26 38
	"	" " " 10 p. c. " 281.70, 88713, do.		28 17
	23	" " " 10 p. c. " 364.60, 88404, Gray		36 46
	28	" " " 10 p. c. " 103.50, 88118, Montague		10 35
	16	" " " 10 p. c. " 272.50, 88641, Franklin		27 25
	29	" " " 10 p. c. " 255.60, 89041, Siegel		25 56
May	16	" " " 10 p. c. " 379.70, 89401, Nanson		37 97
	23	" " " 25 p. c. " 161.58, 93564, Wlrice		40 39
	28	" " " 25 p. c. " 94.80. 97728, Leftwich		23 70
	"	" " " 25 p. c. " 94.80. 97729 do.		23 70
	31	" " " 10 p. c. " 754.90, 89283, Lavielle		75 49
		Am't forward		1,005 90
50				
51		Am't bro't forward		1,005 90
1873.				
June	5	By com's @ 27½ p. c. on 103.50, No. 93536, Hogan		28 46
	9	" " " 10 p. c. " 281.70, 90033, Booth		28 17
	"	" " " 25 p. c. " 260.60, 98066, Leiser		65 15
	20	" " " 27½ p. c. " 301.90, 97962, Evans		83 02
	"	" " " 25 p. c. " 58.50, 94652, Colcord		14 62
	28	" " " 10 p. c. " 220.70, 90165, Masterbrook		22 07
	"	" " " 25 p. c. " 106.10, 94301, White		26 52
	30	" " " 25 p. c. " 102.00, 98633, Dietz		25 50
July	12	" " " 25 p. c. " 6.77, 98288, Birt		1 69
	"	" " " 25 p. c. " 58.96, 98351, Owen		14 74
	"	" " " 27½ p. c. " 88.45, 99267, Lawinstein		24 32

	12	By com's @ 27½ p. c.	on 93.90, 99073, Shaws				25 82
	"	" " " 10 p. c.	" 150.95, 91219, Livingston				15 09
	14	" " " 27½ p. c.	" 5.28, 99368, Sharrue				1 45
	22	" " " 25 p. c.	" 120.10, 99037, Butler				30 02
	"	" " " 25 p. c.	" 255 60, 98312, Scott				63 90
	"	" " " 25 p. c.	" 22.70, 99490, Kirk				5 67
	"	" " " 10 p. c.	" 119.50, 87765, St. John				11 95
	25	" " " 25 p. c.	" 225.60, 94619, Finny				56 40
	"	" " " 10 p. c.	" 471.80, 90063, Ashbrook				47 18
	"	" " " 25 p. c.	" 214.80, 95113, Weiss				53 70
	31	" cash					26 01
	"	" " overchg.	on prem's of Strauss & Loewnestien				4 33
Aug.	12	" com's @ 25 p. c.	" 104.90, No. 94268, Keach				26 22
	26	" " " 10 p. c.	" 53.05, 87362, White				5 30
	20	" " " 10 p. c.	" 79.14, 91602, Fisher				7 91
	"	" " " 10 p. c.	" 52.76, 91603, do.				5 27
	"	" " " 10 p. c.	" 149.37, 91600, do.				14 93
	"	" " " 10 p. c.	" 135.70, 91601, do.				13 57
	30	" " " 10 p. c.	" 141.70, 86822, Boogher				14 17
	"	" " " 25 p. c.	" 57.00, 97616, Omurad				14 25
	"	" " " 27½ p. c.	" 313.00, 98898, Doyle				86 07
Sept.	9	" cash balance due on Owen's note					23 20
	"	" com's @ 15 p. c.	on 58 96, No. 98351, Owen				8 84
	11	" " " 25 p. c.	" 10.89, 99839, Morgan				2 72
	6	" " " 10 p. c.	" 471.80, 92008, Ashbrook				47 18
		Am't forward					1,951 31

52 1873. July 12. To cash com's 25 p. c.

53 Amt. brot. forward 1,951 31

1873.							
Sept.	13	By com's @ 10 p. c.	on 119.50, No. 87765, St. John				11 95
	"	" " " 25 p. c.	" 17.32, 99299, Clusk				4 33
	"	" " " 25 p. c.	" 10.56, 99482, Fallis				2 64
	"	" " " 25 p. c.	" 13.72, 99718, Organ				3 43
	15	" " " 25 p. c.	" 36.10, 99635, Seebold				9 02
	"	" " " 25 p. c.	" 36.10, 99636, do				9 02
	17	" " " 25 p. c.	" 6.77, 98288, Birt				1 69
	"	" " " 25 p. c.	" 10.35, 99717, Hubbard				2 58
	20	" " " 10 p. c.	" 296.40, 92329, Besoll				29 68
	"	" " " 10 p. c.	" 74.10, 92330, do.				7 44
	"	" " " 10 p. c.	" 73.25, 87166, Crowell				7 31
	22	" " " 25 p. c.	" 120.10, 99037, Butler				30 02
	23	" " " 25 p. c.	" 55.85, 99421, Wasson				13 96
	"	" " " 25 p. c.	" 55.85, 99422, do.				13 96
Oct.	17	" " " 27½ p. c.	" 5.28, 99368, Shurrae				1 45
	1	" " " 25 p. c.	" 36.10, 99636, Seebold				9 02
	"	" " " 25 p. c.	" 36.10, 99637, do.				9 02
	11	" " " 10 p. c.	" 157.00, 88582, Smith				15 70
	"	" " " 10 p. c.	" 385.60, 88583, Hasting				38 56
	28	" " " 25 p. c.	" 313.00, 99351, Smith				78 25
		" " " 25 p. c.	" 490.20, 99840, Ring				122 55
		" " " 25 p. c.	" 15.84, 99923, March				3 96
		" " " 25 p. c.	" 21.92, 99983, Steinn				5 30
		" " " 25 p. c.	" 82.90, 99984, Williams				20 73
		" " " 25 p. c.	" 32.85, 100113, Shelton				8 22
		" " " 25 p. c.	" 7.92, 100114, Priest				1 98
		" " " 25 p. c.	" 11.40, 100115, Ilse				2 85
		" " " 25 p. c.	" 11.70, 101097, Lauberson				2 92
		" " " 10 p. c.	" 247.80, 99627, Kupferle				24 78
		" cash to bal. %					151 63
		" " 5 p. c.	" 247.80, on % c. $1,000 loan				12 39
		" "					21
Nov.	28	" "	prem. 101097, Laueberson refunded by H. office				12 70
	10	" com's @ 25 p. c.	on 36.10, No. 100174, Wilhite				9 02
	14	" " " 25 p. c.	" 260.60, 98066, Lisser				65 15
	17	" " " 25 p. c.	" 11.40, 100115, Ilse				2 85
		Amt. forward					2,687 52

54

55 Amt. brot. forward 2,681 52

1873.							
Nov.	19	By com's @ 25 p. c.	on 23.35, No. 100214, Franck				5 83
	22	" " " 10 p. c.	" 161.58, 93564, Ulrice				16 15
Dec.	15	" " " 25 p. c.	" 15.84, 99923, March				3 96
	"	" " " 10 p. c.	" 119.50, 88765, St. John				11 95
	"	" " " 10 p. c.	" 512.20, 94383, Sessingham				51 22
	"	" " " 10 p. c.	" 536.30, 94628, do.				53 63
	16	" " " 27½ p. c.	" 94 93, 102728, Sprunragel				26 10
	22	" " " 25 p. c.	" 120.10, 99037, Butler				30 02
	30	" " " 10 p. c.	" 337.00, 85862, Brown				33 72
	31	" " " 25 p. c.	" 6.77, 98288, Birt				1 69
	"	" " " 27½ p. c.	" 5 28, 99368, Shanae				1 45
	"	" " " 10 p. c.	" 106.10, 94301, White				10 61

1874.										
Jan.	12	By com's @	25	p.c.	on	53.85,	99481, Wasson			13 96
	"	" "	25	p.c.	"	55.85,	99432, do.			13 96
	"	" "	25	p.c.	"	36.10,	99636, Seebold			9 02
	"	" "	25	p.c.	"	36.10,	99635, do.			9 09
Feb.	2	" "	30	p.c.	"	36.63,	103791, Hoffheinn			10 95
	9	" "	25	p.c.	"	11.40,	100115, Dee			2 86
	10	" "	25	p.c.	"	15.84,	99923, March			3 96
Mch.	20	" "	25	p.c.	"	120.10,	99037, Butler			30 01
	21	" "	30	p.c.	"	6.37,	104342, Mitchel			1 92
	"	" "	25	p.c.	"	36.10,	100174, Nilhite			9 02
	26	" "	30	p.c.	"	131.90,	104678, Welge			45 53
	"	" "	30	p.c.	"	19.89,	104851, Brown			
	28	" "	27½	p.c.	"	5 28,	99288, Shanae			1 45
	"	" "	25	p.c.	"	58.96,	98451, Owen			14 74
April	1	" "	30	p.c.	"	59.67,	104026, Kielesunen			17 90
	"	" "	30	p.c.	"	63.70,	104555, Leeding			19 11
	"	" "	25	p.c.	"	52.62,	101248, Shaw			13 15
	"	" "	25	p.c.	"	36.10,	99635, Seebold			9 02
	"	" "	25	p.c.	"	36.10,	99636, do			9 02
	17	" traveling expenses from Baltimore to N. Y. & return								25
May	2	" com's @	25	p.c.	on	27.75,	No. 105065, Morris			6 93
	"	" "	27½	p.c.	"	23.35,	105064, Howe			6 42
	"	" "	30	p.c.	"	99.45,	104944, Phillips			29 83
	"	" "	30	p.c.	"	204.00,	105500, Taussig			61 20
		Amt. forward								3,297 85
56										
57										
		Amt. brot. forward								3,297 85
1874.										
May	5	By com's @	25	p.c.	on	15.84,	No. 99923, March			3 96
	7	" "	25	p.c.	"	36.10,	100174, Nilhite			9 02
	13	" "	30	p.c.	"	67.35,	105192, Bain			20 20
	"	" "	20	p.c.	"	262.00,	105739, Welge			52 40
	26	" "	27½	p.c.	"	324.70,	106188, Tiechmann			89 29
June	4	" "	25	p.c.	"	471.80,	106129, Ashbrook			117 95
	13	" "	30	p.c.	"	197.90,	105682, Bloess			59 37
	"	" "	30	p.c.	"	279.53,	106372, do			83 86
	"	" "	30	p.c.	"	63.70,	104555, Luding			19 11
	16	" "	30	p.c.	"	48.10,	106591, Whitmon			14 43
	"	" "	25	p.c.	"	53.30,	105261, Boogher			13 32
	27	" "	25	p.c.	"	27.75,	105065, Morris			6 93
July	7	" "	27½	p.c.	"	182.30,	106768, Teaube			50 13
	11	" "	30	p.c.	"	198.90,	107003, Bremmenan			59 67
	20	" "	30	p.c.	"	36.63,	103791, Hoffheinn			10 98
	28	" "	25	p.c.	"	120.25,	106554, Edgerly			30 06
Aug.	1	" "	25	p.c.	"	36.10,	100174, Wilhite			9 02
	15	" "	30	p.c.	"	67.35,	105192, Bain			20 20
Sept.	3	" "	25	p.c.	"	13.88,	106651, Wright			3 47
	"	" "	25	p.c.	"	13.88,	106651, Wright			3 47
	"	" "	25	p.c.	"	13.14,	105224, Gould			3 28
	15	" "	30	p.c.	"	63 70,	104555, Luding			19 11
	"	" "	25	p.c.	"	53.70,	107968, Jackson			13 43
	28	" "	25	p.c.	"	27.75,	105065, Morris			6 94
Oct.	31	" "	30	p.c.	"	67.35,	105192, Bain			20 21
Nov.	4	" cash								100
	14	" com's @	25	p.c.	on	66.21,	No. 109338, Skinker			16 55
	30	" "	25	p.c.	"	13.14,	105224, Gould			3 28
Dec.	26	" "	25	p.c.	"	27.75,	105065, Morris			6 94
1875.										
Jan.	25	" "	7½	p.c.	"	324.70,	106188, Teichmann			24 35
	27	" "	7½	p.c.	"	36.63,	103791, Hoffheinn			2 75
	30	" "	30	p.c.	"	67.35,	105192, Bain			20 20
	"	" "	30	p.c.	"	195.15,	109881, Schlossstine			58 54
Feb.	3	" "	7½	p.c.	"	59.67,	104026, Keilesnir			4 47
	11	" "	25	p.c.	"	12.74,	109903, Mitchell			3 18
	22	" "	25	p.c.	"	53.70,	107962, Jackson			13 43
		Amt. forward								4,291 04
58										
59										
1875.		Amt. brot. forward								4,291 04
M'ch	9	By com's @	7½	p.c.	on	131.90,	No. 104678, Welge			9 89
	1	" "	7½	p.c.	"	19.89,	104851, Brown			1 49
	15	" "	7½	p.c.	"	23.35,	105064, Howe			1 75
	23	" "	7½	p.c.	"	99.45,	104944, Phillips			7 46
	26	" "	7½	p.c.	"	27 75,	105065, Morris			2 08
	"	" "	25	p.c.	"	52.45,	110191, Ready			13 11
	"	" "	30	p.c.	"	61.90,	110228, Wuerpel			18 57
	"	" "	30	p.c.	"	111.63,	110228, Wuerpel 110336, & Goelz			33 48
	"	" "	25	p.c.	"	50.45,	110191, Ready			13 11
	"	" "	20	p.c.	"	112.48,	110503, Wangler			22 49

April	1	By com's @ 7½ p. c. on 262.00,		105739, Welge		19 65
	7	" " " 7½ p. c. " 204.00,		105500, Tausig		15 30
May	3	" cash				5
	7	" com's @ 7½ p. c. on 67.35,		105192, Bain		5 05
	19	" " " 7½ p. c. " 471.80,		106129, Ashbrook		35 38
June	4	" " " 7½ p. c. " 120.25,		106554, Edgerly		9 01
	8	" " " 7½ p. c. " 48.10,		106591, Whetmore		3 60
	15	" " " 7½ p. c. " 182.30,		106768, Traube		13 67
	19	" " " 25 p. c. " 52.45,		111091, Ready		13 11
	22	" " " 7½ p. c. " 198.90,		107003, Bremmemann		14 91
	30	" " " 25 p. c. " 30.84,		109765, Bartlett		7 71
July	1	" " " 7½ p. c. " 27.75,		105065, Morris		2 08
	26	" " " 7½ p. c. " 36.63,		105791, Hoffheinn		2 74
	31	" " " 7½ p. c. " 87.70,		107055, Beader		13 15
	"	" " " 7½ p. c. " 87.70,		107054, do.		
Aug.	4	" " " 25 p. c. " 136.25,		113615, Orthwein		34 06
	"	" " " 7½ p. c. " 67.35,		105192, Bain		5 06
Sept.	1	" " " 25 p. c. " 30.84,		109769, Bartlett		7 71
	2	" " " 7½ p. c. " 255.60,		107880, Paul, jr.		19 17
	28	" " " 7½ p. c. " 379.70,		111528, Giersidieck		28 47
	"	" " " 7½ p. c. " 77.75,		105065, Morris		2 08
Oct.	1	" " " 25 p. c. " 62.50,		112326, Eiskin		15 63
1876.						
Jan.	15	" " " New York Life Ins. Co. total				74 30
						4,761 30

60

61 And thereupon the clerk of said court issued a summons, which is in the words and figures following, to wit:

Summons.

UNITED STATES OF AMERICA,
Eastern District of Missouri, set:

In the circuit court of the United States in and for said district.

The President of the United States of America to the marshal of the United States in and for said district, greeting:

You are hereby commanded to summon Davis R. Boogher, Jesse L. Boogher, Rufus Randell, and John B. Nowlan, citizens of the State of Missouri, that they be and appear before the honorable circuit court of the United States in and for the eastern district of Missouri, on the first day of the next term thereof, to be holden at the city of St. Louis, in and for said district, on the third Monday of March next, then and there to answer the complaint of The New York Life Insurance Company, a corporation and citizen of the State of New York, as set forth in the petition filed in said court on the first day of March, A. D. eighteen hundred and seventy-six. Hereof fail not, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, the 1st day of March, A. D. eighteen hundred and seventy-six. Issued at office in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.]

M. M. PRICE,
Clerk.
By A. P. SELBY,
Deputy.

And upon said writ the marshal endorsed his return, in words and figures following, to wit:

Return.

UNITED STATES OF AMERICA,
Eastern District of Missouri, set:

I hereby certify that I have duly served this writ by leaving a copy thereof, with a copy of the petition thereto attached, on the within-named Rufus Randell, and further, by leaving a copy of this summons with each one of the within-named, Davis R. Boogher, Jesse L. Boogher, and John B. Nowlan, in this city of St. Louis, in the eastern dis-
62 trict of Mo., on the 3d day of March, 1876.

H. W. LEFFINGWELL,
United States Marshal, Eastern District of Missouri,
By C. E. GOEST, *Deputy.*

And afterwards, at the March term, 1876, of said circuit court, and on the 10th day of April, the defendant, Davis R. Boogher, filed his separate answer to plaintiffs, in words and figures following, to wit:

Separate answer of D. R. Boogher.

In the circuit court of the United States for the eastern district of Missouri.

NEW YORK LIFE INSURANCE CO., PLAINTIFF,
vs.
DAVIS R. BOOGHER ET AL., DEFENDANTS.

Defendant Davis R. Boogher, for separate answer herein, denies that he has not faithfully discharged his duties as agent to plaintiff; denies that he has not paid over or handed over to plaintiff all money belonging to plaintiff which has been received by him, or for which he is liable as such agent; denies that he owes or is indebted to plaintiff in the sum of $1,400.98, or any other sum for money received by him as agent for plaintiff, or on any account, or for which he is in any way liable to plaintiff; denies that he has been requested to pay over said sum or any sum to plaintiff, and denies that he has failed or refused to pay over any sum to plaintiff for which plaintiff had any lawful claim upon him; denies severally and collectively each and all items of indebtedness charged against him in the account annexed to the petition herein as Exhibit D. Wherefore he prays judgment accordingly.

And for further answer this defendant says, that by the sealed contract of appointment between plaintiff and this defendant, executed on the 23d day of December, 1873, and referred to in the petition herein as Exhibit E, it was expressly agreed between said parties that said last-named contract abrogated all former contracts between said parties, so far as new business was concerned; that is to say, so far as business thereafter done by this defendant as agent for plaintiff was concerned; and this defendant says that said stipulation in said last-named
63 contract was part of the consideration to him moving in accepting and executing said contract on his part; and he further says, that all the matters and things complained of by plaintiff herein concern said new business; that is to say, business done by this defendant as agent for plaintiff since the date of said last-named contract, to wit,

December 23rd, 1873. And defendant says that by reason of said premises he has been by plaintiff released from the said obligation sued on herein. Wherefore he prays judgment accordingly, &c.

And for a counter-claim herein, this defendant says that by a certain contract on file herein as Exhibit C, accompanying the petition (and said contract in all its details is made a part of this counter-claim and prayed to be taken by the court as embodied herein), the plaintiff agreed to pay and allow this defendant certain percentages or commissions therein specified on all premiums collected and received by plaintiff on policies of insurance effected through this defendant; that said commissions were to continue to be paid to this defendant during the term of ten years from the date of said contract, unless this defendant were sooner suspended for good cause; that by said contract it was agreed that this defendant should have the right and duty of collecting all premiums on such insurances of persons as he might effect in the plaintiff, and of paying over the same to plaintiff after deducting the said commissions allowed this defendant by said contract; that about June, 1875, plaintiff, without any cause whatever, refused to permit this defendant to collect said premiums on said insurances effected by him in plaintiff, and informed this defendant, through one of its agents, that the plaintiff would not permit this defendant to further perform this contract, or to proceed to do business thereunder, and plaintiff then and there refused to perform (and abandoned) said contract on its part; that this defendant then was, and always has been ready and willing to perform, and has duly performed, all the conditions on his part to be fulfilled according to the terms of said contract (which said contract was under seal), but plaintiff then refused, and has ever since refused, to perform
64 said contract on its part, or to pay this defendant anything according to its terms, whereby this defendant has been greatly damaged by the said breach of the said contract, namely, in the sum of six thousand dollars, for which he prays judgment against plaintiff herein.

MARSHALL & BARCLAY,
For Defendant.

On said 10th day of April, 1876, the said other defendants filed their joint answer in words and figures as follows, to wit:

Joint answer of sureties.

In the circuit court of the United States for the eastern district of Missouri.

NEW YORK LIFE INSURANCE CO., PLAINTIFF,
vs.
DAVIS R. BOOGHER ET AL, DEFENDANTS.

Defendants Jesse L. Boogher, Rufus Randall, and John B. Nowlan, for their separate answer herein, deny that said Davis R. Boogher has not faithfully discharged his duties as agent to plaintiff; denies that said Davis R. Boogher has not paid over or handed over to plaintiff all money belonging to plaintiff which have been received by him, or for which he, Davis R. Boogher, is liable as such agent; deny that said Davis R. Boogher owes or is indebted to plaintiff in the sum of $1,400.98, or any other sum, for money received by him as agent of plaintiff, or on

any account, or for which he is in anyway liable to plaintiff; deny that said Davis R. Boogher or these defendants have been requested to pay over said sum or any sum to plaintiff; and deny that they or any of them have failed or refused to pay over any sum to plaintiff for which plaintiff had any lawful claim upon them or either of defendants; deny severally and collectively each and all items of indebtedness charged against said Davis R. Boogher or against them on the account annexed to the petition herein as Exhibit D. Wherefore they pray judgment according, &c.

And for further answer these defendants say, that by a certain sealed contract of appointment between plaintiff and said Davis R. Boogher, executed on the 23rd day of December, 1873, and referred to in the petition herein as Exhibit C, it was expressly agreed between said
65 parties that said last-named contract abrogated all former contracts between said parties so far as new business was concerned; that is to say, so far as business thereafter done by said Davis R. Boogher as agent for plaintiff was concerned; and these defendants say that said stipulation in said last-named contract was part of the consideration to said Davis R. Boogher moving in accepting and executing said contract on his part; and these defendants further say that all the matters and things complained of by plaintiff herein concern said "new business"; that is to say, business done by said Davis R. Boogher as agent for plaintiff since the date of said last-named contract, to wit, December 23rd, 1873. And defendants say that by reason of said premises they have been by plaintiff released from the said obligations sued on herein. Wherefore they pray judgment accordingly. Wherefore defendants ask to be hence discharged with their costs.

MARSHALL & BARCLAY,
For Defendants.

And at said March term, 1876, of said circuit court, the plaintiff, on the 11th day of April, 1876, filed its separate replications to said separate answers, which are in words and figures following, to wit:

Reply to separate answer D. R. Boogher.

In the circuit court of the United States for the eastern district of Missouri.

NEW YORK LIFE INSURANCE COMPANY, plaintiff,
vs.
DAVIS R. BOOGHER ET AL., DEFENDANTS.

And now comes said plaintiff, and for reply to the new matter set out in the second count of the separate answer of Davis R. Boogher herein, denies that the stipulation therein set forth was part or any consideration to said defendant in accepting and executing the contract bearing date Dec. 23, 1873; denies that by reason of said stipulation or contract or by any other means defendant has been released from the said obligation sued on in petition.

And for reply to the counter-claim set out in the third count of the separate answer of said defendant Davis R. Boogher, plaintiff de-
66 nies that by the terms of said contract described as Exhibit C, certain or any commissions were to continue to be paid to plaintiff during the period of ten years from the date of said contract; denies

that by said contract it was agreed that said defendant should have the right and duty of collecting all premiums on such insurances as he might effect in plaintiff, and of paying over the same after deducting his commissions; denies that about June, 1875, or at any other time, plaintiff without any cause refused to permit defendant to collect said premiums; denies that it informed plaintiff, through one of its agents, or otherwise, that it would not permit said defendant to further perform his contract, or to proceed to do business thereunder; denies that it then and there, or at any other time, refused to perform and abandoned said contract on its part; denies that defendant then was or ever has been ready and willing to perform or has performed all the conditions on his part to be fulfilled according to the terms of said contract; denies that plaintiff then refused, or has since refused, to perform said contract on its part, or to pay this defendant according to its terms; denies that defendant has been damaged by said alleged breach in the sum of six thousand dollars or of any sum whatever.

And for a further reply to said counter-claim, plaintiff states that on the 6th of November, 1870, in accordance with the terms of said contract filed in this case, and marked Exhibit C, said defendant was discontinued for cause by this plaintiff as its agent, and that by reason thereof all commissions which would accrue to him under that or any former contract were forfeited unconditionally, for that said defendant had failed and refused, and then failed and refused after demand in writing, as he has done ever since, to pay over to plaintiff the sums due from him as agent as set forth in the petition herein, and failed and refused to perform his duties as agent as stipulated in said contract. Wherefore plaintiff asks judgment.

By its attorney, F. N. JUDSON.

67 *Reply to separate ans. of Randell et al.*

In the circuit court of the United States, eastern district of Missouri.

NEW YORK LIFE INSURANCE COMPANY, plaintiff,
vs.
DAVIS R. BOOGHER ET AL., DEFENDANTS.

Now comes the plaintiff and for reply to the new matter alleged in the second count of the separate answer of defendants Jesse L. Boogher, Rufus Randell and John B. Nowlan, denies that the stipulation therein set forth was part or any consideration to Davis R. Boogher in accepting and executing the contract bearing date Dec. 23d, 1873; denies that by reason of said stipulation or contract, or by any means, defendants have been released from the obligation sued in the petition. Wherefore plaintiff asks judgment.

By its attorney, F. N. JUDSON.

And afterwards, at said March term, 1876, of said circuit court, the following further proceedings were had in said cause on the 18th day of April, 1876, to wit:

NEW YORK LIFE INS. CO., PLAINTIFF,
vs.
DAVIS R. BOOGHER ET AL., DEFENDANTS.

Now come the said parties by their attorneys, the plaintiff by F. N.

Judson, esquire, and the defendants by Messrs Marshall and Barclay, and this cause being regularly called for trial, and both parties being ready, it is ordered that a jury come, and thereupon comes said jury, to wit: Charles F. Lee, R. J. Emmons, L. W. Hewett, A. L. Shortridge, J. M. England, John Alb, Robert W. Nelson, John W. Redmond, Benj. A. Alderson, A. O. Nelson, Anderson Bowles, and Jefferson Sullenger, twelve good and lawful men duly sworn and empaneled well and truly to try the issues joined herein, and now by consent of parties it is ordered that a juror be withdrawn, and said juror being withdrawn, it is ordered that this cause be referred to Amos M. Thayer, for final report, subject however to exceptions.

68 And afterwards, to wit, at the September term, 1876, of said circuit court, the following further proceedings were had in said cause on the 28th day of October, 1876, to wit:

Judgment.

NEW YORK LIFE INSURANCE COMPANY, plaintiff,
vs.
DAVIS R. BOOGHER ET AL., DEFENDANTS.

Now come the said parties by their attorneys, the plaintiff by F. N. Judson, esquire, and the defendants by Messrs. Marshall and Barclay, and the exceptions to the referee's report herein being submitted to the court, and the same having been duly considered, it is ordered that said exceptions be overruled, and that the report of the referee be and the same is hereby confirmed and approved, and thereupon this cause is submitted to the court upon the pleadings and the report of said referee, on consideration whereof the court finds that the defendant Davis R. Boogher, is indebted to the plaintiff by reason of the breaches of the writing obligatory sued upon in the sum of twelve hundred and seventeen dollars and fifty-two cents.

It is therefore now considered by the court that the plaintiff, the New York Life Insurance Company, have and recover against said defendants, Davis R. Boogher, Jesse L. Boogher, Rufus Randall, and John B. Nowlan, the sum of five thousand dollars, the penalty of the bond sued upon, to be discharged however upon the payment of said sum of twelve hundred and seventeen dollars and fifty-two cents, the damages so as aforesaid by the court assessed, and the costs herein expended, together with the sum of one hundred and twenty-five dollars allowed by the court to Amos M. Thayer, as referee, and that execution issue therefor.

69 And afterwards, to wit, at an adjourned day of the September term, 1876, held on the 12th day of January, 1877, the defendants filed their bill of exceptions in this cause, which is in words and figures as follows, to wit:

Bill of exceptions.

In the circuit court of the United States for the eastern district of Missouri.

NEW YORK LIFE INSURANCE CO., PL'FF,
vs.
DAVIS R. BOOGHER ET AL., DEF'TS.

Be it remembered that in the progress of this cause the following pro-

ceedings were had, to wit: When said cause came on for trial before the referee the following was the evidence adduced, to wit:

PLAINTIFF'S EVIDENCE.

WILLIAM S. HILL, sworn for plaintiff, says:

I am general agent of the plaintiff, and have been such agent since 1871. Was agent before the first appointment of D. R. Boogher.

Witness shown Exhibit D, and says: There are two accounts embraced in Exhibit D. One is a general account, containing debits and credits. In that account defendant is charged with monies by him drawn, and he is credited with his commissions. The other account I was compelled to open by the defendant's defalcations. In this 2d or special account he is charged with monies collected by him on premiums and appropriated, and he is credited with certain commissions earned on policies taken out before the second appointment, December 23, 1873. The entries in these accounts were made by me, or under my supervision. These accounts are correct transcripts from my books.

Accounts offered in evidence by plaintiff, marked Exhibit D.

(Defendants object to the account. The referee admits the accounts, but requires the plaintiff further evidence of the correctness of the same.)

Plaintiff offers agreement of December 22d, 1873, and also letter of agreement dated Dec. 22, 1873.

(Letter objected to by defendants, and objections overruled.)

The local board was organized by defendant, by the company's permission. The defendant shared the commissions allowed him
70 with the local board. The first items of the general account, four in number, were items charged back to the defendant for which he had once received credit. I supervised all the entries contained in this account, and verified their correctness. The item of August 30, 1873, was a note taken by defendant and charged back to him because not paid. The item of date August 30, 1873, was for policy issued by the company and not taken by the assured. In such case the company by rule required the agent to pay $5.00 to cover expenses. The item of September 13, 1873, was for a premium on a policy by defendant delivered which he could not return, and the premium was charged defendant. The item of September 22d was a local board matter. The item of December 22nd is a local board matter. The item of December 21st, 1873, arose from an agreement with defendant that 5 per cent. of his renewal commission should go to cancel his indebtedness. The four items of Dec. 31, 1873, were items of this kind, when defendant has been charged with 5 per cent. and credited with 10 per cent. The item of May 13, 1874, is a local board matter. Items of July 1st and 3rd were a local board matter. Local board charges occurred in this way: Parties would come in and pay their premiums, less the commission allowed them by the defendant, that deduction, which was 2½ per cent. and charged to the defendant. As he had to pay it out of his commision, it was debited to him. These accounts do not show fully all transactions between plaintiff and defendant. Sometimes his commissions were paid him in cash, and not credited on this account.

Witness, shown "special account," says: This account was opened because defendant collected premiums and retained them, and this was kept for my convenience, so that I could get credit with the home office, and not stand charged with his defalcation. This indebtedness the

home office acknowledge', and I was not charged with it. The credit items on this account are defendant's renewals on policies issued under first contract. The debit items of this account were premiums
71 collected by the defendant and not accounted for. The first debit item defendant acknowledge'. Have his receipt (No. 1), which is as follows:

Referee's Exhibit No. 1.

ST. LOUIS, *M'ch* 30, 1872.

Received of New York Life Ins. Co., per W. L. Hill, two hundred forty-five $\frac{47}{100}$ dollars, as per the company's letter Dec. 12, 1871. This am't to bear interest from Dec. 12th, 1871, at the rate of 7 % per annum until paid.

$245.47. D. R. BOOGHER.

Demanded payment October 7, 1874.

Item Oct. 8, '74, was money loaned him by the company to pay his indebtedness to the company. Supposed he then owed the company $1,000. Have the note still (No. 2), which is as follows:

Exhibit No. 2.

$1,000.00. ST. LOUIS, MO., *Octo. 8th*, 1873.

One year after date I promise to pay to the order of New York Life Insurance Co. one thousand dollars, value received, negotiable and payable, without defalcation or discount, with interest at the rate of ten per cent. per annum from date.

D. R. BOOGHER.

Item December 16th, 1873. This item, $1,028.24, was money due the company. He arranged the matter in New York. This was for premiums collected by him and not paid over. Think I talked with defendant about this item, among others, and that he admitted it.

Item December 18, 1874. Have defendant's acknowledgement of this item (No. 3), as follows:

Exhibit No. 3.

Special report of business in the hands of D. R. Boogher.

Mr. Wm. L. Hill, agent at St. Louis, Mo., to New York Life Insurance Co., Dr.

No. of policy.		Name.	Rate of commission.	Annual, semi-annual, or quarterly.	Cash.	Interest.	Total.
95113	July 23.	Weiss	.....	S. A.	214 80	4 95	219 75
106371	June 15.	Bain	30	A.	127 15	3 05	130 20
107054	" 27.	Raeder	25	S. A.	87 70	2 05	89 75
055	" 27.	do.	30	"	87 70	1 88	89 58
						11 93	$529 28

72 CONTRA.

By dividend, 95113		25 70	
" commission on 127.15, @ 30 %,	106571	38 14	
" " 87.70, " 25 %,	107054	21 92	
" " 87.70, " 30 %,	055	26 31	
		112 07	112 07
Balance			417 21
			529 28

I hereby acknowledge to have collected the above premiums and retained the money in my possession.

Dated St. Louis, Dec. 7, 1874.

D. R. BOOGHER.

Item May 21, 1875. This was a premium collected by defendant and retained. He acknowledged to me that he collected it.

Item June 1st, 1875. Policy was issued and binding receipt given by defendant. Defendant said he got a note for premium, but he never turned it over.

Item June 9, 1874. I have the defendant's acknowledgment of this item (No. 4), as follows:

Exhibit No. 4.

Premiums retained by Davis R. Boogher, agent at St. Louis.

To New York Life Insurance Co., Dr.

No. of policy.		Name.	Annual, semi-annual, or quarterly.	Cash.	Policy fee.	Interest.	Total.
	1874.						
111598	Sept. 28.	Greisdeick	A.	379 70	1	11	391 70
	1875.						
638	M'ch 3.	Meyer	A.	215 65	1	.....	216 65
112736	Ap'l 1.	Erskine	S.	62 50	1	.....	63 50
549	" 16.	Boogher	Q.	30 10	1	.....	31 10
109765	M'ch 1.	Bartlett	"	30 84	....	.....	30 84
				718 79	4	11	733 79

I hereby acknowledge to have received the above policies & renewal for collections and retained the amounts.

Dated June 14, 1875.

D. R. BOOGHER.

In October, 1874, went to the defendant and demanded the payment of note for $1,000, and premium of $245.00. Have credited de-
73 fendant with his commissions up to November 6th, 1875. Plaintiff and myself never consented to the defendant retaining these premiums at any time.

Notice, dated August 18th, 1875, offered by plaintiff. Defendant admits that notice was served on him (No. 5), which is as follows:

Exhibit No. 5.

NEW YORK, *Aug. 18th*, 187[illegible].

D. R. BOOGHER, Esq.:

You are hereby instructed to pay over to this company, or to W. L. Hill, general agent at St. Louis, all monies due from you to the company, as agent, under agreements of October 27th, 1871, and December 23d, 1873, covering premiums collected by you and not heretofore paid over, together with all other sums due from you, as said agent, on any account whatever. And you are hereby notified that in case of a failure on your part to comply with this demand, the said agreements will be annulled for cause, and your agency under the same terminated in accordance with their provisions.

Yours, truly,

W. H. BEERS,
Vice President.

Plaintiff offers letter, dated *dated* November 6, 1875, Exhibit No. 6, as follows:

Exhibit No. 6.

NEW YORK, *Nov. 6th*, 1875.

D. R. BOOGHER, Esq.,
St. Louis, Mo.:

DEAR SIR: You are hereby notified that your agreements with this company, under date of Octo. 27, 1871, and Dec. 23, 1873, are terminated for cause, and that your agency under the same will cease & determine from and after this date, and that all commissions which would accrue under said agreements, or either of them, are forfeited to the company.

Yours, truly,

WM. H. BEERS,
Vice-President.

Mailed original to D. R. Boogher myself on the 6th of Nov., '75, in one of my office envelopes.

WM. L. HILL.

Cross-examined:

After defendant had collected these premiums the plaintiff assented to his keeping these premiums, because they could not help themselves, and this assent last' from March 1st, 1871, to November 6th, 1875.

74 A note was taken for part of these defalcations. Note was not taken in liquidation of the debt. Note was taken for the premiums which he collected. He gave the note to the company, and he drew draft on the company for $1,000 and turned the money over to me, and I sent the money forward to the company in one of my general settlements.

CREDITS ON THE GENERAL ACCOUNT.—Defendant has had credit for all his commissions, either in money or by credit on his account. Can't give the amount of money that was paid him in cash and not credited on the account here produced. Defendant would borrow money,

behind. Defendant got credit for all the commissions on policies which he solicited. This is true of policies on which he did not collect the premiums. All policies which he solicited he got credit for whether he collected the premiums or not. Don't recollect that defendant told me that Bloëss was going to change his policy. I took Bloëss' appli-
78 cation myself. The premium was seven hundred and some odd dollars. I entered this up in my own name, because I solicited this risk. Bloëss came into the office and inquired for me. In year 1874, defendant insured Bloëss on Tontine plan. Bloëss came to me in 1875 and we had some conversation, and he took out a policy on another plan at my instance and surrendered old policy. The only rule the company had in such case to pay the commission to the party who wrote the application. Bloëss did not say anything that I recollect about a previous conversation with the defendant, but did say "he did not want defendant to come near him."

Exhibit 8 shown witness (and is as follows):

Exhibit No. 8.

NEW YORK, *Dec. 26th*, 1874.

W. L. HILL, Esq.,
St. Louis, Mo.

DEAR SIR: Your letter, containing the acknowledgement of Mr. Boogher of the receipt of certain premiums which he has not turned over, and inquiring what you should do in the matter, rec'd. We are surprised that you should ask this question, as there is only one thing to be done. Mr. Boogher must pay the money over immediately or suffer the consequences.

Yours, truly,

WM. H. BEERS,
Vice-Pres't.

Witness says: He don't remember when this was written; think it was about the 13th June, 1875.

Witness' attention called to letter dated August 30, 1875. I recollect this letter, and have the letter to which this is a reply. Saw D. R. Boogher afterwards about matter mentioned in this letter. Don't know how I came to make up the memorandum Exhibit 8 above mentioned. Mr. Boogher's indebtedness on the "special account" at one time ran up as high as $2,200, or thereabouts. The notes did not include any matters in the "general account," but only moneys detained by
79 defendant. At date of this memoranda defendant was entitled to a credit on his general account of $1,880.11. At the same time as said on this memoranda there was due on these particular items $771.65. The ledger account showed a balance due $243.42. I don't recollect anything about this memoranda No. 8, nor what it was given for. June 14, 1875, was not the last premium that defendant had an opportunity to retain. There is no claim for moneys retained by defendant after the 1st July, 1875, but the retention may not have come to my knowledge till after July 1st, 1875. Have no knowledge of his collecting and retaining moneys after July 1st, 1875. Don't remember if I claimed in September, 1875, that the defendant's indebtedness was $1,500. If the letter which you hold says so to the defendant's sureties, then I wrote them to that effect. Made no statement to Bloëss when he called to take out policy that Boogher was no longer connected with company. My recollection is that the statement I made in the court of criminal

correction was that the first time I knew the defendant had quit the plaintiff's company was by finding him at work for another company. Don't remember what I testified to in that court as to how defendant come to quit plaintiff's employ. Before giving defendant the formal notice to quit the plaintiff's employ, defendant had ceased to do work for plaintiff. Don't recollect that the defendant wrote to me demanding that he should be allowed to go on under his contract. Wrote to defendant's sureties, saying that defendant was indebted to the company in the sum of fifteen hundred dollars. Wrote this letter in September, 1875.

Defendant's commissions on renewals from September 6, 1875, to March 1st, 1876, would not amount to $1,500. Can't say what the amount would be during that time. The company did not refuse to take risks tendered by the defendant about May or June, 1875. Our refusal to let him collect money was about May or June, 1875.
80 That refusal was not withdrawn, but nevertheless defendant did collect some money after that date. We tried to fix the matter up and let him go on again about July, 1875, but our exertions fell through. He declined to get the consent of his sureties, and so the matter ended. Never had asked the consent of sureties to our paying defendant money and letting him go on before this time in July, 1875. Don't recollect conversation between defendant and Odell in my presence about the date of second contract concerning advances of money. While defendant was connected with our company Mr. Franklin was president, Beers vice-president, and Odell was superintendent of agencies. There was another party by name of Wheaton who acted as assistant superintendent of agencies.

Re-examined:

I am styled general agent and manager of plaintiff for the State of Missouri. I collect premiums and have general supervision over plaintiff's business in this State under the company's direction. The company own all the books and papers in my office. The bank account of the company was formerly kept in my name, but it is now kept in my name as agent. All items of money charged against defendant in this account are monies of the plaintiff, and not my individual funds. I never advanced him monies except out of company's funds. I remonstrated with defendant about retaining moneys. Defendant never made claim to any right to retain moneys under his contract. Prior to July, 1875, the company had threatened to discharge defendant on one or two occasions for retaining money, to my personal knowledge. In summer of 1875 I found out that defendant was paying his private debt to a policy-holder by use of the premiums due from such policy-holder to the company. Learned this from the policy-holder, and defendant corroborated the statement when I talked to him about it.

Letters written by plaintiff to the witness, dated May 24th, 1875, June 7, 1875, Dec. 26, 1874, and May 12, 1875, offered in
81 evidence by the plaintiff, and here produced and shown witness, and identified, being Exhibits Nos. 8, 9, 10, 11.

Exhibit 8.

NEW YORK, *Dec. 26th*, 1874.

W. L. HILL, Esq.,
St. Louis, Mo.:

DEAR SIR: Your letter containing the acknowledgement of Mr.

Boogher of the receipt of certain premiums which he has not turned over, and inquiring what you should do in the matter, rec'd. We are surprised that you should ask this question, as there is only one thing to be done: Mr. Boogher must pay the money over immediately or suffer the consequences.

Yours, truly,

WM. H. BEERS,
Vice-Pres't.

Exhibit 9.

NEW YORK, *May 12th*, 1875.

W. L. HILL, Esq.,
St. Louis, Mo.:

D'R SIR: Your favor of the 6th inst., touching money in the hands of Mr. B., rec'd, and we must confess to surprise after our letter to you of Dec. 26th, giving our views of your duty in case of the retention of money by Mr. B. We don't care what he has to say, and we don't expect you to receive your instructions from him, particularly as to the handing over of monies belonging to the co. We have had some correspondence with him, but have uniformly given him to understand, in as plain language as we could use, that we do not intend to make any change in our manner of collection of pr'ms of business secured by him. Two or three of his letters are unanswered, and probably will remain so, as we have nothing new to add to what we have already said. You will please see to it that Mr. B. responds and that immediately.

Yours, truly,

D. O'DELL,
Supt. Agencies.

Exhibit 10.

NEW YORK, *May 24th*, 1875.

W. L. HILL, Esq.,
82 *St. Louis, Mo.:*

DEAR SIR: Yours of the 21st inst. rec'd. You will please not deliver any policies or renewal receipts to Mr. Boogher, so long as he holds moneys of the Co. in his hands which should have been paid over, but make the collections yourself. In one of his letters he asks for a loan which the co. will not consider. Mr. Wheaton will probably visit St. Louis shortly, and you will please give him full information respecting Mr. B.

Yours, truly,

D. O'DELL, *Sup't.*

Exhibit 11.

NEW YORK, *June 7th*, 1875.

W. L. HILL, Esq.,
St. Louis, Mo.:

D'R SIR: We notice that we have rec'd a few app'ns from you lately taken by Mr. Boogher. Of course you are giving such attention to the collection of the pr'ms that he will not succeed in getting any more of our money in his hands.

Yours, truly,

D. O'DELL,
Sup't Agencies.

(Defendants object to letters of date May 12, 1875, and May 24, 1875. Objections overruled and letters admitted.)

On receipt of letter December 26, 1874, I spoke to Boogher about it, and also concerning letter of May 12th and 24th and June 7th, 1875. I always obeyed instructions contained in these letters, and informed Boogher what my instructions were. Mr. Boogher never claimed any right to retain moneys under any contract, or by reason of any course of dealing had with the company. The company never declined at any time to accept risks tendered by the defendant or to credit him with commissions, even after we declined to allow him to collect premiums. We told him we were willing that he should go on if he would pay up his indebtedness. In July or August the defendant went on
83 to New York to settle up his matters with the company. He was referred back to me, and I had some intercourse with him. We talked about an arrangement, whereby I was to advance him one hundred and fifty dollars a month, and let the contract remain the same as before, providing his sureties would consent to the arrangement. He did not obtain his sureties' consent and the matter fell through.

Letters dated July 20th and 21st, 1875, Nos. 12 and 13, offered in evidence. Also letter of August 28th, 1875, No. 14.

Exhibit 12.

Mr. D. R. BOOGHER,
Gen'l Ag't:

DEAR SIR: You will please either send me the policy on my life as agreed, or call and refund the money paid you on the 21st May. Your prompt attention to this matter will oblige,

Respectfully,

W. M. PRICE.

Saint Louis, July 20th, 1875.

Exhibit 13.

ST. LOUIS, *July 21st*, 1875.

W. L. HILL, Esq.:

DEAR SIR: Enclosed find letter from Mr. Price, received yesterday, which speaks for itself. The premiums of Morris Wemple & W. F. Boogher, due last month, have also been paid but not reported; the renewal receipts, however, are in your possession. These renewals, together with the Price premium, I will account for when the commission on the Bloess policy has been credited up to its rightful owner. I also gave binding receipt on the Phelps policy, taking his note for the premium, which is still in my hands unpaid. On the Orthwein & Trisler policies nothing has been paid to me, nor binding receipts given in either case. These several policies are in your hands. I have done nothing further in reference to them, as the action of the company has placed it beyond my control.

Yours, truly,

D. R. BOOGHER.

Exhibit 14.

ST. LOUIS, MO., *Aug.* 23, 1875.

84 W. L. HILL, Esq.:

DEAR SIR: In answer to your interrogatories of yesterday about my

resuming operations for the company, I would, in the first place, refer you to my letter of July 20th, which embodies a portion of what I desire.

In addition to that I would say, I insist upon my recognition as general agent by the company in point of attending to the collection of my individual business, where parties fail to bring on or send their premiums to the company's office; that my name as gen'l ag't appear upon the renewal receipts of my business; that I can keep my own account, and report all moneys through your hands at the will of the company promptly. Again, my financial condition requires that I should receive such aid from the company as to release me from the payment of my present indebtedness, by charging it up against my renewal interest, and in addition thereto to render me the necessary pecuniary assistance as I go on, that I may not be compelled to use the company's money, which I most assuredly will never do again. If I can't make such arrangements to avoid this difficulty, I will be necessitated to engage with another company within a few days. I have certainly devoted to these matters all the time I could afford, with due respect to the N. Y. Life. I would also refer you to my second letter, wherein I stated that I should prefer to have the business of 1875 put on a brokerage com. This will relieve me of some of my present indebtedness to the company. These, however, are matters for reflection, which simply require your attention. And I further state, that the last words Mr. O'Dell said to me a few moments before leaving his office, that he, meaning the company, would consent to any arrangement that we agree upon, hence the whole matter seems to rest in your hands. If the company, through you, adjusts our differences amicably and satisfactory, it will result largely to the interest of all parties concerned, and I will soon begin to roll in the
85 business with my former zeal and enthusiasm, as soon as I can rally my forces into line. And finally I would call your attention to the fact that during my trouble with the company my paper went to protest, something that has never before occurred with me in all my business affairs.

Can I willingly work as agent for any company who would place me in such a damaging position? Hoping you will give these suggestions your serious attention and reply favorably, I will be most happy to commence business on or about Sept. 1st, 1875.

Respectfully, yours,

D. R. BOOGHER.

The failure to obtain consent of sureties, above mentioned, was after the date of letter of August 28th, 1875.

Plaintiff offers letter dated May 19th, 1875, signed by defendant, Exhibit No. 15, which is as follows:

Exhibit 15.

ST. LOUIS, *May* 19, 1875.

W. H. BEERS, *V. P.:*

DEAR SIR: As yet I have received no answer to the last letter I wrote you concerning my connection with the co., but I took it for granted that you must have written and the letter has failed to reach me, as I am unwilling to believe that either you or the co. would treat me with such pointed discourtesy as to refuse answering my letters to you. My former letters will explain my zeal in this matter. I am in debt to the co.; I am making but little or nothing, and must alter my course in

order to avoid positive suffering of my family. If the co. will advance me $2,500 on the strength of my renewal interest in the business I have already worked up, I think I can manage to tide over my present difficulties and continue my work for the co., hoping that business will improve as the season advances. Can I hope that the co. will do anything for me in this line? Of course, if in the letter I presume you have written me other arrangements have been tendered that would
86 be more satisfactory to the co. and of assistance to me in my present strait, I am content; but if not, I must repeat, the necessity compels me to seek some change in my condition. May I rely upon a speedy communication from you?

Very respectfully,

D. R. BOOGHER.

In reference to the Brown premium, I received letter from the company, which I have and now produced, dated March 6, 1872. Exhibit No. 16 (which is as follows):

Exhibit 16.

NEW YORK, *Mar.* 6, 1872.

W. L. HILL, Esq.,
St. Louis, Mo.:

DEAR SIR: Yours of the 29th ult. received. My letter of the 15th respecting commissions on board member was final, and I supposed the matter was fully understood by Mr. Boogher. I do not understand how he could have conceived the idea that the company would pay board commissions in addition to the amount to be paid him after our conversation respecting the matter, and I am sorry now that we ever gave him the privilege of establishing a board at St. Louis.

With reference to the premium of Brown, $337.20, you are authorized to accept Mr. Boogher's receipt for the amount and report it to us as cash, provided his commissions and $2,507, which we agreed to advance him under date of December 12th, equal that sum.

You may say to Mr. Boogher that I took from the box sent us 250 copies, which I asked him to send to me for my own personal use, and that the balance were mailed up by the instruction of the officers, and are at his disposal. Please pay Mr. B. for the 250 copies I took, charging it in your account as furnished O'Dell.

Yours, truly,

D. O'DELL,
Sup't Agencies.

87 That letter also relates to the letter No. 7, offered by Mr. Marshall. I obeyed the instructions in this letter, and defendant did not lay claim to any further advances thereunder. Mr. Boogher knew about the charge made against him of five dollars for policies not taken and objected to it.

Recross-examination:

The company made advances to other agents besides Mr. Boogher, one at Macon and one at Kansas City, and we sued the parties on their bonds. We made advances to one or two others, but we never made advances except where it was provided for in their contract. Advances were made to these parties to the extent of two hundred dollars or three hundred dollars apiece.

Plaintiff closes its case.

DAVIS R. BOOGHER recalled.

Have seen renewal receipts issued under policies secured by me. I now produce said receipts, eight in number.

Exhibits No. 26, offered in evidence, are as follows:

Exhibits 26.

NEW YORK LIFE INSURANCE COMPANY, 346 & 348 BROADWAY.

Notice to policy-holders.

The agreement is mutual (see application and policy) that unless the premium, on or before the day it becomes due, the policy is forfeited and void. Agents are not authorized to make, alter, or discharge contracts or waive forfeitures. Payments of premiums to agents are not valid unless receipts be given signed by the president, vice-president, or actuary. When receipts are sent to agents for delivery, such agents must countersign the same as evidence of payment to them. All premiums are due and payable at the office in New York. For the convenience of the assured, they may be paid to an agent, but on the production of the receipt above specified.

No. 105,261. $53.30..... Cash. M'ch 7, 1875.
..... Credit.
..... Int. on credits.

88 Received fifty-three .30 dollars, in full for 2 annual premiums on policy numbered as above, on life of D. R. Boogher, to June 7, 1875.

WM. H. BEERS,
Vice-President and Actuary.

WM. L. HILL,
C.

Not valid unless countersigned by W. L. Hill, general agent.

All renewal receipts are of this kind. All of them specified that they were not binding unless countersigned by Hill.

I always objected to the renewal receipts being put in this form. I wanted them countersigned by me, and always objected to their being put in this shape.

Cross-examined:

I objected to this form of renewal receipt at the time of the second contract. I received a salary from the Maryland Life at the rate of $2,500 per year. That contract is for one year. I have an oral agreement that I am to have five per cent. on renewals. I am guaranteed twenty-five hundred dollars per year, and haven't made anything in excess of the guaranty. My salary began November 1st, 1875.

The agreement that I should pay over collections promptly was first abandoned when I collected the Brown premium. Under the second contract that clause was expressly abandoned at an interview with Mr. O'Dell at Hill's office. I called Hill up and said to O'Dell, I wanted Mr. Hill to understand the arrangement, so that I could draw money when I wanted it without his feeling that he was not authorized to let me have it. I don't think O'Dell at this time said anything about my retaining premiums. Had a conversation with the company in New York last summer. O'Dell said they did not want me to retain premiums and objected to it, and said they preferred to do business on a different basis.

I never denied retaining premiums. I can't fix any date when Hill said I could retain premiums that I collected; but he did say it on some 89, 90 occasions. For instance, once in a while when I collected a premium I would say to Hill I wanted to use the money, and Mr. Hill would say it was all right, and I would give a receipt.

PLAINTIFF'S REBUTTAL TESTIMONY.

Mr. Hill recalled, and looks at Exhibit 17, which is as follows:

Exhibit 17.

		Com.			Int.		
Greisdeik,	380 70	94 92	(25 %)	285 70	15 95		301 73
Bartlett,	30 84	7 71	(25 %)				23 13
Meyers,	216 65	75 45	(35 %)				141 17
Erskine,	63 50	21 87	(35 %)				41 63
Boogher,	31 10	10 53	(35 %)				20 57
							528 23
Due on ledger a/c							243 42
							$771 65
Old a/c is cr. with							1,880 11

Boogher, on or about April 30, 1875, asked for information as to certain policies. I gave him statement showing what was due on certain polices in his hand. There the amount due on ledger account and then the amount credited to him on his general account, but failed to give him the debit side of his account, which was an item of $3,245.03. Witness looks at Exhibit No. 26, which is as follows: Entered on page of def't's evidence.

91, 92 *Exhibit* 30.

Memo. of policies (business obtained by D. R. Boogher) appearing on Schedule No. 26, but lapsed prior to Nov. 1, 1875.

				Annual premium.	
87765, St. John,	lapsed	M'ch,	'74, Q	478	
763, Goodfellow,	"	"	" A	425 60	
8e11e, Montagne,	"	Sept.,	'73, S	206	
404, Gray,	"	Jan'y,	'75, A	364 60	
5-3, Hasting,	"	Ap'l,	'75, "	571 20	
89283, Leviclle,	"	May,	'74, "	785 20	
90167, Masterbrook,	"	June,	'75, "	220 70	
92009, Ashbrook,	"	Sept.,	'75, "	471 80	
92917, Fimey,	"	"	'73, "	220 70	
94619, do.,	"	Dec.,	'73, S	451 20	
93536, Hogan,	"	Nov.,	'73, "	217	
94268, Keach,	"	Sept.,	'73, Q	451 90	
627, Knpferle,	"	"	'75, A	247 08	
97728, Luftnich,	"	Oct.,	'73, S	379 20	
98066, Leser,	"	May,	'74, "	260 60	
524, Fountain,	"	June,	'74, A	255 60	
523, Walker,	"	"	" "	198 90	
898, Doyle,	"	"	" "	318	
99351, Smith,	"	July,	'75, "	313	
840, Ring,	"	"	" "	490 20	
984, Williams,	"	Oct.,	'73, Q	331 60	
					7,653 10

Above business done under 1st contract; all below under 2d contract.

104555, Ludwig,	lapsed	Dec.,	'75, Q	254 80	
105192, Bain,	"	Oct.,	'75, "	269 40	
682, Bloess,	"	Ap'l,	'75, A	197 90	
106372, do.,	"	"	" "	279 55	
039, Loser,	"	May,	'75, "	179 15	
650, Wright,	"	Sept.,	'74, Q	55 52	
107962, Jackson,	"	Aug.,	'75, "	107 40	
105224, Gould,	"	Jan.,	'75, "	52 56	
108903, Mitchell,	"	Ap'l,	'75, "	50 96	
110191, Ready,	"	Sept.,	'75, "	197 90	
					1,645 14
Total					9,298 24

93 Exhibit No. 30. (This exhibit entered on page .)

Of my own knowledge I know that these policies have lapsed. I conversed with Boogher prior to his going to New York. The conversation concerning the consent of his sureties was subsequent to his going to New York.

Mr. Boogher, in summer of 1875, made it a condition to his going on that he should have an advance of money from the company. He said he was not going to use the company's money again, and that he must have an advance. The company agreed to this, to give him an advance of one hundred and fifty dollars per month, if his sureties would assent to it. I wrote and delivered this letter, Exhibit No. 28, to J. L. Boogher. He replied that he could not decide the matter. Said Exhibit No. 28 is as follows:

Exhibit 28.

ST. LOUIS, MO., *Sept. 6th*, 1875.

JESSE L. BOOGHER, Esq.,
Cor. Main & Washington Ave., St. Louis, Mo.:

SIR: I hereby notify you that we claim an indebtedness in the sum of $1,500 against Davis R. Boogher, for moneys received by him as agent and not paid over to the company, for which am't we look to you for payment as surety on his bond of $5,000, bearing date December 21st, 1871, in favor of the New York Life-Insurance Company.

This *is* notice is to the effect that unless you notify us immediately of your objections thereto we propose to continue said D. R. Boogher in our employ. Failing in receiving such immediate notice from you, will be construed by us that you consent to said continued employment, and it shall not impair or prejudice our claim upon you as surety, and that you also consent to our postponing any legal actions against you to which we are entitled by virtue of said bond.

Yours, truly,

WM. L. HILL,
Gen'l Ag't N. Y. Life-Ins. Co.

94 This paper is a memorandum of an agreement given to Mr. Boogher to get his sureties to sign, Exhibit No. 29, and is as follows:

Exhibit 29.

This memorandum, made this day of September, 1875, witnesseth: That we, the undersigned sureties on the bond executed on the 22nd

day of December, 1871, which said bond is executed in favor of the New York Life-Insurance Company, as obligee, in the sum of five thousand dollars, and conditioned for the faithful discharge of his duties as agent of said company by Davis R. Boogher, the principal in said bond, do hereby acknowledge to have received notice of the claim of said obligee, the said New York Life-Insurance Company, that said D. R. Boogher has fail' to pay over a large sum of money, to wit, the sum of fifteen hundred dollars, about that sum, which he has received as agent of said company, and that there has been a breach of the condition of said bond; and we, the said sureties, with full knowledge of said claim of said company, do hereby expressly consent and agree that said D. R. Boogher may continue as agent of said company under his present contract, with such additional stipulations as may be agreed on between him and said company, and that said bond shall continue in full force, both as to past and future transactions.

In witness whereof we hereto affix our hands and seals the date aforesaid.

[SEAL.]
[SEAL.]
[SEAL.]

I delivered this paper, Exhibit 29, to D. R. Boogher, and he brought it back and said he would not do anything about it. Met Boogher on Olive street afterwards and asked him if he was working for the New York Life, and he said "No."

I first knew that defendant was working for the Maryland Life on November 5th, 1875, when some one handed me Boogher's card. I never refused to let the defendant have renewal receipts to collect.

95 Mr. Boogher never claimed that he had a right under this contract to collect renewals, but he wanted to do so as matter of courtesy.

Cross-examined:

Don't recollect if the defendant said at the interview on Olive street that he was willing to go on as soon as he and the company had settled their affairs. The company were willing to let defendant go on if the sureties had signed this agreement. Boogher objected to the form of these renewal receipts.

Letter Exhibit No. was substituted for Exhibit No. . The company, on September 6, 1875, was willing to let Boogher go on if the sureties assented to this letter.

Nowland said that he did not care anything about the matter as he was indemnified. J. L. Boogher said he would let me know about it. I had no further response from the sureties.

Boogher and the plaintiff were agreed as to terms, on September 6th, 1875, and Boogher could then have gone on if the sureties had assented.

The terms of the agreement were that defendant was to have an advance of one hundred and fifty dollars per month to be charged up against him. His commissions were to remain the same.

This letter was delivered to all the sureties. None of the sureties notified me that they would assent to it.

Defendant had sent in an application for the Ring policy on September 4th, 1875, preceding this letter. The company did not allow the defendant to proceed without compliance with the terms of this letter. Boogher never came around the office after September 6th, 1875. I don't recollect that defendant offered to go on after September 6, 1875.

Could not say that defendant did not offer to go after September 6, 1875, if this assent was not required of his sureties.

Re-examined—D. R. BOOGHER:

96 On Olive street, Hill asked me if I was working for the New York Life, and I said I was willing to go on if the company fixed up the breach of the contract which I claimed. I sent in the Ring policy on September 4, 1875. My old indebtedness was to stand against my renewals under the arrangement made for an advance. After letter of September 6, 1875, I conversed with Hill about going on. I said I was willing to go on, if they did not require the assent of my bondsmen.

Cross-examined:

Never tendered the amount of my indebtedness to the company prior to November 6, 1875.

97 DAVIS R. BOOGHER, having been duly sworn, was examined on the part of the defendant, and testified as follows:

Q. Give your full name?

A. Davis R. Boogher.

Q. You are the defendant in this case?

A. Yes, sir.

Q. When did you go into the employ of this company?

A. In November, 1871.

Q. At the time of the making of this first contract?

A. Yes, sir; it dates, I believe, the 1st of Nov.

Q. State was was the reason that the said contract mentioned in this case came to be made?

A. It grew out of a breach of the first contract by the company.

(Here counsel for pl'ff objected to the form of the question, and also to anything that occurred prior to the date of the contract mentioned in this case.

The COURT. Let the witness state the facts and conditions under which that contract was made.)

Q. You claim a breach of the first contract on the part of the company?

A. Yes, sir.

Q. And in consequence of that the new contract was made?

A. Yes, sir.

Q. After the making of the first contract what understanding did you have, or agreement, with regard to advances to be made by the company?

(Objected to by counsel for pl't'ff, as the contract speaks for itself, and as immaterial and incompetent. The objection was overruled by the court (Referee). Counsel for pl't'ff then and there duly excepted to the ruling of the court.)

A. Well, the first agreement I had with the company in that respect was in November or December.

Q. What year?

A. 1871. It was after the first contract was made.

98 JUDSON, (pl'ff's att'y.) That was after the first contract and before the second?

A. Yes, sir. There was a subsequent agreement. In fact it was understood all the time during my connection with the company, but the first agreement that was in writing at all was a letter which was written in December.

Q. It occurred by way of correspondence?

A. Yes, sir. Upon receipt of that letter I submitted it to Mr. Hill, and upon that letter I was allowed to use the first premium. When I collected the policy of Mr. Brown, which amounted to over $300, the company allowed to use the entire premium. I submitted that letter to the St. Louis office, and I collected *and I collected* the Brown premium and used the money by authority of the company. I gave my note for it, and the receipt I hold I believe to this day.

The COURT. This letter dated Dec. 7 is the one you speak of?

A. Yes, sir; referring to the Brown premium.

Q. Well, what later conversations did you have with any of the officers in regard to advances?

A. Well, the same thing frequently came up. I can't remember any of the dates, but after the first letter it came up frequently and I was allowed.

(Objected to by counsel for pl't'ff. The court sustained the objection. Counsel for def't then and there duly excepted to the ruling of the court.)

WITNESS. I had a conversation with Mr. Odell, general superintendent of agencies, at the office here in St. Louis, in the presence of Mr. Hill, after the making of the second contract. I will have to refer to the breach of the contract in order to get at what I want to say.

Q. Confine your statement to that interview with Mr. Odell.

A. I called his attention to the fact that I would require from time to time advances from the company, as I wanted it understood with Mr. Hill, so there would be no difficulty on that point afterwards.

JUDSON. Please fix the date of that.

A. I don't remember the date. I remember it was when he came here, but I don't remember what time it was.

Q. What year was it?

A. It was in the year of 1873, I presume, after the second contract had been made. The second contract was made December, 1872, or January, 1873, and I presume this was long after that.

Q. What year?

A. It was the beginning, I think, of 1874. It was 'long about the holidays. I called his attention to the fact that I was needing money for work more than the commissions under the contract; that I was in need of money from time to time to meet certain expenses, and I wanted it understood when I needed money I could get it. He said it was all right, I could just call on Mr. Hill for it, and it would be all right. Well, the matter was spoken of at different times. At different times I spoke to Mr. Hill about the advances, and whenever I needed money I called for it and got it. Frequently I got in policies, and the premiums would not be collected for some time—sometimes it would be collected the same day, or before the policy was issued, and sometimes not for thirty days afterwards. And I was always allowed under those circumstances to——

(Objected to by counsel for pl't'ff.)

Q. State specifically what he said in a specific case, what was settled upon.

A. Sometimes one amount and sometimes another. It varied sometimes. It depended on the size of the policy. Sometimes I collected and used the whole of the premiums.

Q. What would Mr. Hill say when you collected and used the whole of the premiums?

A. He would generally state that it was charged up. I would use the premium. For example, I might have two or three policies in

100 my hands, of which the premium was to be collected, amounting to $200 or $300, or maybe $500. I would collect a portion of it and use that premium, and state to Mr. Hill that fact, and when I got my other premiums I would make good all these advances. I would collect the other premiums and pay up, and then I would have those premiums or commissions credited to my account opposite to the advances charged. That was the way it went during my connection with the company all the while.

Q. What was the first intimation you had of the intention on the part of the company not to let you proceed any further?

A. It was in April, 1874, I think. That is, when I was not permitted to go on and deliver my policies.

Q. You mean 1874 (1875)?

A. Yes, sir; in April, 1875.

Q. What occurred between you and Mr. Hill, or any other agent of the company, at that time, in regard to that matter?

A. There was a certain policy to deliver at a residence in St. Louis, and he simply refused to turn the policy over to me to be delivered.

Q. Was that a policy of one of your applications?

A. Yes, sir.

Q. And he refused to let you deliver the policy?

A. Yes, sir.

The COURT. Do you remember what policy that was?

A. That was a policy on the life of John W. Fregler.

Q. Well?

A. I think he called at the office and got the policy afterwards.

Q. After he refused to let you have it?

A. Yes, sir. After I did not get it I insured him in another company. I put him in another company and collected the premium and returned it regularly.

Q. Did they refuse anybody else?

A. That was the first refusal. The second refusal, I believe, was in May or June, the same year. He refused and gave me notice—

101 Mr. Hill did—that I could not go on any further, and deliver my policies.

Q. He told you so?

A. Yes, sir. There were several policies in the office, lying there. One on the life of a man named Phelps, and one on the life of a Mr. Charles F. Orthwein, and one also on the life of a Mr. Price.

Q. Prior to this time that Mr. Hill gave you notice that you could not go on any further and deliver policies, had you collected money and not accounted for it to Mr. Hill, by telling him what had been received, and how much, &c.?

A. No, sir.

Q. You always reported to him?

A. Yes, sir.

Q. That you had received so and so much, and that you had retained as advances so and so, or something of that kind?

A. Yes, sir.

Q. You always accounted to him for it?

A. Yes, sir.

Q. Did you have any conversation in New York with Mr. Odell in the summer of 1875, about this matter of advances?

A. In 1875?

Q. Yes. Was there anything said about it there?

A. In the summer previous, I believe it was; but my conversations

in regard to advances from time to time was had almost entirely with Mr. Hill. It was understood that I should have that privilege.

(Objected to by counsel for plaintiff, who wished the witness to state specifically what was said.)

Q. Did you have any conversation with Mr. Hill about these advances?

(Counsel for pl't'ff objected to form of question.)

A. Why, it occurred every month, I suppose, in the year. I was doing a pretty heavy business, and of course my expenses were pretty heavy. I had to have assistants, and the company settled it with me through Mr. Odell.

JUDSON. Q. State the time and place.

A. I was connected with the company about three years and a half, and we hadn't had a settlement during that period; during
102 my entire connection with the company my account had not been adjusted at any time; but it was frequantly remarked, or something under which it would come up every few days or every month. I remember in the spring of 1875, when the company refused to allow me to go on and do business and deliver policies and collect premiums, and all that sort of thing, Mr. Hill and I talked the matter over in the office, and I refused to go on with the work. He wanted me to assume operations for the company, and I refused to do it unless he fixed matters to my satisfaction.

JUDSON. Q. State what was said.

A. It was with regard to these collections, collecting the premiums, and one thing and another. Mr. Hill said that if I would go on and continue with the company that he was perfectly willing to assist me in any way necessary, if I would give them the business. That conversation was in the office in the spring of 1875, and during these collections, when I refused to go on or continue with the company, all growing out of their acting in that way.

Q. Well, were you ready and willing to proceed under the contract at all times, if it was faithfully carried out on the part of the company?

A. Yes, sir; and I always did everything I could to urge it.

Q. Did you ever have any conversation in New York with Mr. Odell about advances?

A. Oh, yes.

Q. What was it?

A. Well, I made, I think, some three or four trips to New York while I was connected with the company. I don't remember the exact dates, except the last time I was there, which was in the summer of last year. In the second trip I made, which was in December, 1873, the matter came up in the home office in New York.

(Objected to by counsel for pl't'ff.)

Q. Was it in regard to advances?

A. It was in regard to advances.

(Objected to by counsel for pl't'ff as incompetent. The court
103 sustained the objection. Counsel for def't then and there excepted to the ruling of the court.)

Q. I will ask you to state what Mr. Odell said then in regard to your making use of the company's money that you had received from time to time by way of advances.

The COURT. If that was prior to second contract, it would be incompetent.

Q. Since the second contract, did a conversation occur at the office there, or is that the one you spoke of before?

A. Yes, sir.

Q. Did you have any other *advances* with him about advances?

A. I think the matter was spoken of in New York when the contract was entered into.

Q. We are not speaking about that. How many times did it occur? How often did it occur that you retained this fund with knowledge and consent of Mr. Hill? How often did it occur during your stay with the company?

A. As I said awhile ago, I supposed it occurred every month on an average, probably more frequently than that; and sometimes a period of a longer time than would elapse. In the dull season of the year, take it in the middle of summer, when the business was very dull, the commissions I would be entitled to on the new business would not be enough to pay my necessary expenses, that I would call on Mr. Hill for money to pay my expenses; then during the fall, as my business would be changing for the better, I could get along without any assistance. The insurance business fluctuates very much. In particular months frequently an agent will work for two or three weeks before making anything. I frequently have to work for a whole month without taking an application, during certain seasons of the year, and during that time I would have to have assistance; and the next month, may be, my commissions would amount to between $400 to $500; then I would pay up so far as I could, and then when business slacked up I would cal for it again.

Q. Then your course of dealing was to account to Mr. Hill for these premiums or for collections of any kind?

A. Yes, sir.

104 Q. What did he say from time to time in regard to your overdrawing?

A. Well, sometimes he would remark he would like to have me pay it back as soon as I could, or something of that kind; and I, of course, would do it as rapidly as I could with the commissions on the business. But where I would not make it up, it of course was charged to me.

Q. Did Mr. Hill or any of the officers of the company ever tell you you could not retain any money belonging to the company at all?

A. No, sir; I don't remember of receiving any notice of that kind, except in the spring of 1875.

Q. I am speaking about prior to the notice you got then; had any such thing been stated to you before?

A. Not that I remember, unless it was in 1873, when I referred awhile ago to the first contract.

Q. That is the time you allege the breach?

A. They had alleged I had used their money, when it was simply my own money. That was all suggested in the second contract. Then at the time I negotiated a loan of a $1,000 of the company, the question might hav · arisen at that time.

Q. I want to ask you about that first $1,000 note, which you gave. Do you recollect the $1,000 note which is in evidence?

A. Yes, sir.

Q. What were the circumstances under which that note was given?

A. Well, that note was given simply as a balance to settle up with the company for moneys I had expended. I had employed a couple of agents to work for me during the time I was employed with the company; one gentleman's name was Keech. I secured to the company by

giving him an interest in the contract, and Professor James F. Clark, whom I was to guarantee $106 a month. Mr. Keech was a party to my contract. By arrangement I had with him he was to take several policies of insurance to the applicants and collect the premiums, but instead of collecting the money he gave his notes, or took notes
105 rather, for the premiums, and these notes were never paid. Well, of course, that matter had to be fixed up. The policies were out and delivered and the notes were not paid, and the responsibility of course fell on me. The notes were taken in my name, and I had to assume the responsibility. I got behind from that fact; not that there was any money particularly that passed between us, but because I failed to get the money on the notes, and have to this day. I was the loser, and I got behind hand in that way, and I simply asked the company to make me a loan of a $1,000 to square up the liability which I had to assume.

Q. Through whom did you obtain that?

A. I think that was negotiated through Mr. Hill; I don't remember. I think, now, I wrote to the company. I had correspondence with the company, and the matter was referred back to Mr. Hill, and he had some correspondence with the company, and then the company made me a loan of a $1,000, and I gave him my note.

Q. This is the note here?

A. Yes, sir; it was, entirely, of course, a personal matter. I was the loser, of course, for I failed to collect the premiums on these notes, and the matter had, of course, to be fixed up in some shape, and that was the way we took to fix it up.

Q. What was the nature of the second transaction of about a $1,000 charged against you as cash?

A. Well, that was money which belonged to me, based upon the terms of my contract, and the company refused to pay it. I had used it in my business because it was my money. They called for it, but I refused, of course, to turn it over, because it was not their funds. It was my own private funds, according to the terms of my contract. I had a contract with local board——

(Objected to by counsel for pl'ff.)

Q. I am speaking about this $1,000 charged against you as cash.
106 A. That was prior to the execution of the second contract.

Q. "December 16, 1873, cash $1,028.24," that you say, do I understand, to be the amount which you agreed to be charged with on account of this local board transaction?

A. Yes, sir; it was only in the consideration of making a new contract which was supposed to be on more liberal terms, if I would make good that amount. I agreed under those circumstances to stand that loss.

Q. That you intended should be taken out of your renewal commission?

A. Yes, sir.

Q. That note of $1,000, when was that given?

A. That was given in the fall of 1873, October 8th.

Q. Was there ever any demand made upon you at these different times with reference to the balance that you say was struck all the way through there, for the amount which appeared to be due?

A. It was made on me there in New York, in the summer of 1875, for my entire indebtedness to the company.

Q. I am speaking about this balance you say was struck in that way

there, whether for such charge any demand was made upon you at these different times?

A. No, sir.

Q. There was no demand made upon yon?

A. No, sir.

Q. There was no demand for these different balances struck there at any time?

A. No, sir.

Q. Did you have any agreement with *the* them to pay any interest on this balance?

A. No, sir; that was something that was never even intimated to me, that they were going to charge me interest on these advances. I never had any idea of any such thing.

Q. State to the court about this five-dollar penalty business.

A. That covered the medical examination. To issue a policy, a medical examination had to made, and for that the company charged a penalty of five dollars, which I always, of course, protested against, but it was simply charged to me and I could not help myself. In fact,

107 I never had a statement of the account. I never kept any account at all. I left it with Mr. Hill or his bookkeeper to keep my account; it was something I did not bother with at all.

Q. Did you ever have any indications of the administration of the book department of that concern which might show that this account was not strictly kept?

(Objected to by the court.)

Q. Do you know anything about keeping books out of the ordinary run of business?

A. That was something I never paid any attention to; I relied entirely on the bookkeeper to keep my accounts there.

Q. Who was the bookkeeper?

A. A Mr. B. H. Fonts was the bookkeeper up to the summer of 1874; I think it was sometime in 1874 that he was discharged, and then Mr. Couts was employed after that, and he remained with the company up to the time that my connection ceased.

Q. You had nothing to do with keeping the accounts yourself?

A. No, sir; sometimes a dispute would arise between their bookkeeper and myself; sometimes I would turn in monies; I entrusted entirely to him to enter up everything; I remember on two or three occasions he called for premiums on policies which I insisted I had paid, but as I had nothing to show for it, I had to pay them over; that question came up several times; he was not competent in any way to keep the accounts.

(Objected to by counsel for pl'ff; the court sustained the objection; counsel for def't then and there duly excepted to the ruling of the court.)

Q. I will ask you what was the annual interest or income accruing at the time of your separation from the company, arising out of your renewal commissions?

(Objected to by counsel for pl'ff as to' indefinite.)

Q. Take it up to the first of May, say, 1875, what was the value for the previous year for your renewal interest in the business that had already been done?

108 A. Well, I suppose it would amount to about between $1,500 and $2,000, something over $1,500; probably $1,500 or $2,000; I don't remember the exact amount positively, because it was a matter I did not keep any account of.

Q. Have you given the figures that were given to you?

A. I think it was that; you are only going back to 1874; that is between 1874 and 1875 to the first of May; I think it would amount to in the neighborhood of $1,500, probably more.

The COURT. That is, you mean to say your renewal commissions for that year amounted to that?

A. Yes, sir; renewal commissions.

Q. I will ask you what this little figuring is? (Hands paper to witness.)

A. Well, that is simply a statement of my own account.

Q. Who made it out?

A. Mr. Hill.

Q. Did he give it to you as a statement?

A. He gave it to me as a statement of my account from the books.

Q. When was that?

A. That was in either May or June, last year.

Q. After this suit was begun?

A. Yes, sir.

Q. He went on and figured up the statement?

A. He figured it up for the purpose of getting matters fixed up in some shape; the whole amount due on the ledger account at that time was $528, and then the receipt which you have there.

Q. That is $523, less the premiums which you received and kept?

A. Yes, sir.

Here counsel for def't offered and give in evidence Exhibit 17.

EXHIBIT 17.

		Comm.			Int.	
Geisdick,	380.70	94.92	(25%)	285.87	15.95.....	301.73
Bartlett,	30.84	7.71	(25%)		.....	23.13
Myers,	216.65	75.48	(35%)		.....	141.17
Erskine,	63.50	21.87	(35%)		.....	41.63
Boogher,	31.10	10.53	(35%)		.....	20.57
						528.23
Due on ledger 3/c						243.42
						$771.65
Old 3/c is credited with						1,880.11

109 Q. State again who you got that from, and at what time.

A. This was furnished to me by Mr. Hill in the spring of 1875.

Q. After the troubles had begun with the company?

A. Yes, sir; it was furnished as a statement of my account from the books of the company of the old account and the new account.

Q. Now, state how much appeared to be due from you by the old account; I mean due from you by the new account under the second contract.

A. Under the second contract, $528.23.

The COURT. What is that item?

A. It is commissions on first premiums on five policies I had issued, $528.23, and then they had charged on the ledger account, which is an older account, the amount I believe was 243.43.

Q. Due from you to the company?

A. Yes, sir, making $771.66 due the company from me; then there was $1,808.11, which was my commissions coming in to me.

Q. Was that statement of the account by the company correct?

A. It was not the accruing commissions.

Q. Should the renewals between that time and the commencement of this suit amount to more than the sum there shown to be due on your part?

A. I think it would amount to more.

Q. This is the company's statement, I mean?

A. Yes, sir.

(Counsel for pl'ff objected to evidence about renewals.)

JUDSON. If you can't give the figures, state it.

WITNESS. How can I get the figures when I havent got access to the books that show them?

Q. I will ask you whether you are able to state positively if it would be that?

(Objected to by counsel for pl't'ff. The court overruled the objection. Counsel for pl't'ff then and there duly excepted to the ruling of the court.)

110 A. Yes, sir; I can say yes, sir, I know this fact; I know if I had remained with the company; I had made a calculation several times in regard to my renewal interest, and I know if I remained without being in debt in any way, shape, or form, my renewal interests would have been enough, at least, to support me; I can live on $1,500 a year; and on two or three occasions I did estimate my renewal interest.

(Objected to by pl'ff's counsel.)

(Here a letter was shown to witness.)

Q. I want to ask you this question before going ahead with these letters: Did the company ever permit you to collect the renewal premiums on policies which you had received?

A. Well, no, sir; only in certain cases; the renewal receipts were given in the name of Mr. Hill, all of them; the most of the premiums were paid by parties coming into the office; I presume sometimes when a party was delinquent in his payment of a renewal, he would turn him over to me to attend to, but the receipts were all given in the name of Mr. Hill.

Q. Did you ever demand to have it saved to you?

A. I did demand it several times.

Q. Who have you demanded that of?

A. I demanded it of the company, of Mr. Beers and Mr. Odell.

Q. What did they say?

A. They refused it.

Q. When was the last demand made of that kind?

A. The last demand I made in the spring of 1875, and I refused to go on further unless the company would conform to the agreement or contract.

Q. Look at these letters and say where they came from.

(Here letters were shown witness.)

A. These letters came from Mr. Beers and Mr. Odell.

Q. Were they received from time to time according to the dates?

A. Yes, sir.

Q. And this one also?

A. Yes, sir; this is from Mr. Odell, and this letter is from Mr. J. B. Wheaton, the assistant superintendent.

111 Q. I suppose all these letters that have been shown you here came from the company, or from the persons whose names are signed there?

A. Yes, sir.

Here counsel for def't offered in evidence Exhibits No. 18, 19, 20, 21, 22, 23, 24, & 25 (and are as follows):

Exhibit No. 18.

CHICAGO, *July* 6, 1875.

D. R. BOOGHER, Esq.,
Care of W. L. Hill, Esq., St. Louis, Mo.:

D'R SIR: Mr. O'Dell writes to me June 30th, that he is having your a/c made up to July 10th, with a view of making some arrangement to aid you. Will advise you as soon as I receive any further instructions. A friend mentions noticing something in regard to life association, yourself & others. Has anything new developed in that co.?

Respectfully,

J. B. WHEATON,
Assistant Supt. Ags.

Exhibit 19.

NEW YORK, *May 24th*, 1875.

D. R. BOOGHER, Esq.,
St. Louis, Mo.:

D'R SIR: In reply to your favor of the 19th inst., the subject-matter of your letters have been referred to Mr. Wm. L. Hill, our manager at St. Louis, with instructions relative to the different points named. No discourtesy is intended by such reference, but it is necessary that all correspondence should come through the regular channel of the company, on such matters as are referred to in your letters. Mr. Hill is responsible for all money transactions at the St. Louis office, and we beg leave to refer you to him.

Yours, turly,

WM. H. BEERS,
Vice-Pres't.

Exhibit 20.

NEW YORK, *Feb.* 13, 1875.

D. R. BOOGHER, Esq.,
Of. W. L. Hill:

112 D'R SIR: Yours of the 10th inst. rec'd; I suppose you refer to that portion of your letter in reference to the collection of renewals, thinking that it would increase your banking facilities. I thought we had answered this in a former letter. The company cannot permit such a change to be made, and on thinking of the matter a moment I am sure you will be convinced of the correctness of their action, as in such a case it would relieve the manager of the very responsibility which he is expected to assume.

Yours, truly,

D. O'DELL,
Sup't Agencies.

Exhibit 21.

NEW YORK, *Jan'y* 11, 1875.

D. R. BOOGHER, Esqr.,
417 *Pine St., St. Louis, Mo*:

D'R SIR: Your two favors of the 6th inst. rec'd. The officers do not deem it advisable to make any change in the collection of renewals in St. Louis, and they would deem it particularly undesirable to do so for the reason you urge, as it is not expected that any agent shall retain the money of the company in bank in order to establish a larger line of discounts, but, on the contrary, that all money will be handed over to the company as soon as collected. We do not understand the advantage it would be to you to sell out, as you suggest, one of your contracts to the company, as your renewal commissions now coming in on both will very soon amount to as much as the company would pay as commutation.

Your, truly,

D. O'DELL,
Sup't Agencies.

Exhibit No. 22.

NEW YORK, *Oct.* 16, 1873.

D. R. BOOGHER, Esqr.:

D'R SIR: Yours of the 9th inst. rec'd, and contents noted. We do not understand you, in view of the fact that on your late request
113 for an advance you stated that it would make you easy, and enable you to do a large business for us for the next several months, and now almost immediately on having obtained the advance, write us that something else must be done, or you will be obliged to hand us your resignation. I would call your attention to the last written portion of your contract, and will say to you that your resignation would not be accepted, and that if you should persist in terminating your agency or discontinuing your efforts in our behalf, excepting strictly in accordance with your contract, that the company would not consider itself bound to allow your commissions after such discontinuance, and we should expect the prompt payment of your note when it falls due.

As to the organization of the local board at St. Louis, we do not believe it would have any effect whatever, except to give you more trouble, and create a demand on you for commissions for their services, which we do not consider to be of much value, or they would have assisted you to secure the requisite number before this. Beside, we do not feel under any obligation at the present time to establish a board at St. Louis, as it was fully understood between us that, if done at all, it should be done within one year from the date of your contract, and you will doubtless remember that you stated to us that you could secure a board of one hundred members, with ten thousand dollars insurance each, as soon as the 1st of January following, whereas nearly two years have elapsed without having done so. We cannot understand the advantage to you nor to the company of its organization, and were I in your place instead of advocating such a course I should oppose it.

Yours, truly,

D. O'DELL,
Sup't Agencies.

Exhibit No. 23.

NEW YORK, *Dec.* 26, 1872.

D. R. BOOGHER, Esq.,
114 *St. Louis, Mo.:*

DEAR SIR: Your esteemed favor of the 21st inst. is rec'd, and it is hardly necessary for us to say that we are extremely gratified with the amount of business you are sending, and note with equal pleasure the prospects you have in the future. With our best wishes for a happy and prosperous New Year's, I remain,

Yours, truly,

WM. H. BEERS,
Vice-Pres't.

Exhibit No. 24.

NEW YORK, *Aug.* 30, 1872.

D. R. BOOGHER, Esqr.,
St. Louis, Mo.:

DEAR SIR: I enclosed send you a letter which I think will answer your purpose. It is precisely what we mean at any rate, and your parties need be under no apprehension whatever of our going back on anything we have promised you.

Very truly, yours,

D. O'DELL,
Sup't Agencies.

Exhibit No. 25.

NEW YORK, *May* 20, 1872.

D. R. BOOGHER, Esqr.,
St. Louis, Mo.:

DEAR SIR: Yours of the 17th inst. received. Enclosed find circular issued by Mr. Leonard. The charges made are entirely false, and you can so state to parties. We do not think, however, that it is policy for the officers of this company to go into print on the subject. I find yours of the 15th on my return. It is contrary to the policy of the company to purchase any renewal interest. I find by looking at the books that you have been doing quite a nice business, and your commissions alone will be quite heavy.

With sincere regard, and wishing you success, I am,
115 Yours, truly,

D. O'DELL,
Sup't Agencies.

(Objected to by counsel for plff. as immaterial, and as hearsay, and as Mr. Wheaton's opinion. The objection was overruled by the court, and exhibits admitted. Counsel for pl'ff then and there duly excepted to the ruling of the court.)

WITNESS. Mr. Wheaton was assistant superintendent; he came on here, and that letter was written to me. I know him to have been assistant superintendent of agencies. He signs his name that way.

Q. Were you present in the court of criminal correction of St. Louis last summer, or last December, in the case in which Mr. Hill testified in regard to your connection with the New York Life Insurance Company?

A. I was present.

Q. Did you hear him testify?

A. I did.

Q. What did he say about your connection with the company?

A. He said that I had not been discharged by the company at all; that I had gone on my own account; that I simply walked out of the office, and had gone on my own account. That was on or about the 5th or 6th of December, 1875.

Q. Look at these accounts that are here, and say what they are. (Hands papers to witness.)

A. These are simply lists of policy holders in the New York Life, the ones that I put in the company.

Q. These applications you put in, the insurance was applied for in the company on your application?

A. Yes, sir.

Q. And this is the actual amount of premiums paid by these parties?

A. Yes, sir.

Q. Here is a further calculation brought out in this line; what does that mean?

A. That represents the interest I have in them.

Q. Your renewal interest?

A. Yes, sir.

Q. You were paid the first commissions, and this is the subsequent interest?

116 A. This is the subsequent interest; the first commission had been collected and spent.

Q. And this shows the difference between the first and renewal commissions?

A. Yes, sir.

Q. This is the largest amount?

A. Yes, sir; that one was the business under the first contract, and this is the business under the second contract.

Here defendant's counsel offered in evidence Exhibit No. 26 (which is as follows):

117 *Memo. of policies & am't of prem's taken & in force by D. R. Boogher..*

Date of policy.				
1871.				
Dec. 30.	85862, Brown	a..		337 20
1872.				
Jan'y 29.	86621, Boogher, J. P	a..		422 55
	2, " S. L	s..		283 40
Feb'y 19.	87167, Wallan	a..		313
27.	394, Houston	a..		209 30
M'ch 13.	765, St. John	q..		478 00
	3, Goodfellow	a..		425 60
25.	88118, Montague	s..		206 00
Ap'l 6.	403, Teichman, $5,000	a..		295 45
	404, Gray	"..		364 60
11.	582, Smith	s..		314
	3, Haistings	s..		571 20
	1, Huse	a..		337 20
12.	604, Cupples	"..		313
15.	641, Franklin	"..		272 50
	640, Tansey, $7,000	..		204 05
17.	713, Lanimor	"..		281 70
	112, "	"..		263 80
June 30.	91219, Livingston, $5,000	er'or ..		150 95
Ap'l 30.	89041, Seigel	a..		255 60

May	10.	283, Laville		aa..	785 20
	15.	401, Nanson		a..	379 70
June	8.	90033, Booth		a..	281 70
	14.	165, Masterbrook		" ..	220 70
July	18.	963, Ashbrook		" ..	471 80
Aug.	14.	91600, Fisher		" ..	416 97
Sept.	1.	92201, Fergison		" ..	406
	7.	008, Ashbrook		" ..	471 80
		Am't forward			9,582 02
119, 120		Am't bro't for'd			9,582 02
	1872.				
Sept.	19.	Besell,	92329	s..	741
	30.	Finney,	917	a..	220 70
Dec.	30.	"	94619	s a..	451 20
Nov.	22.	Hogan,	93536	" ..	217
	23.	Ulrice,	564, $6,000	" ..	323 16
Dec.	23.	White,	94301	" ..	212 20
	21.	Keach,	268	q ..	419 60
	26.	Lessinghans,	383	a ..	512 20
	1873.				
Jan'y	23.	Weiss,	95113	s a..	420 60
	1872.				
Dec.	15.	Lessinghans,	94628	a ..	536 30
Sept.	25.	Kufferle,	627	" ..	247 80
	1873.				
Ap'l	26.	Leftwich,	97728	s ..	379 20
May	2.	Evans,	962	a ..	301 90
	13.	Lesser,	98066, 1 s a, paid		260 60
July	1.	S ebold,	99635, 2 q p'd		152 40
M'ch	1.	Scott,	98312	a ..	255 61
June	2.	Fontain,	524	" ..	255 60
		Walker,	3	" ..	198 90
	21.	Butler,	99037, 2 q'rs p'd		240 20
	11.	Doyle,	98898	a ..	313
	23.	Straess,	09073, $3,000	" ..	93 90
	19.	Lourstine	267, $3,000	" ..	88 45
July	2.	Smith,	351 ×		313
	7.	Wasson,	421, s a p'd		111 70
	25.	Ring,	840 ×	" ..	490 20
	30.	Williams,	384 ×	q ..	331 60
Aug.	9.	Wilhite,	100174 ⊙	" ..	288 80
	18.	Henn	347 ×	a ..	233 50
					18,201 33
×		Premiums not paid less ⊙			288 80
					17,912 53

ST. LOUIS, Oct. 22d, 1873.

121, 122 *New business done by D. R. Boogher in* 1874.

Jan.	.	103791, Hoffmann	73 26
		106188, Teichman	324 70
Feb.	.	104026, Kielswere	59 67
		342, Mitchell	25 48
M'ch	.	555, Luding	254 80
		678, Welge	131 90
		851, Brown	19 89
		944, Phillips	99 45
		105064, Howe	23 35
		065, Morris	111
Ap'l	.	105192, Bain	269 40
		500, Taussig	204
		739, Welge	262
		682, Bloess	197 90
		106372, do.	279 55
May	.	038, Lesser	140 85
		039, do.	174 15

May	106129, Ashbrook	471 80
	371, Bain	127 15
June	554, Edgerly	120 25
	591, Whitemore	48 10
	651, Wright	55 52
	768, Traube	182 30
	107003, Bremerwame	198 60
	054, Raeder	100
	055, do.	175 40
July	105224, Gould	52 56
Aug.	107820, Paul	255 60
	107962, Jackson	107 40
	10503, Wangler	112 48
	108903, Mitchell	50 96
	110191, Ready	209 80
	109340, Bang	156 50
	881, Schlossteine	184 15
	338, Skenker	66 21
	882, Lechter	350 50
	578, Schlossstine	156 50
	110336, Goetz	49 73
	109765, Bartlett	123 36
		$6,021 22

123 (Objected to by counsel for plaintiff. The court overruled the objections. Counsel for plaintiff then and there duly excepted to the ruling of the court.)

Q. State in a general way what these two exhibits are.

A. That first paper is a list of all my policy holders under the first contract, all of which were in force up the time the company broke my contract. I examined it carefully; you will see how it is made out there, some are marked off in pencil. They were all in force up to the time I left a year ago.

Q. That is, you procured those while working under the first contract?

A. Yes, sir.

Q. And you procured this other list while working under the second contract?

A. Yes, sir; and they were all in force a year ago.

Q. And the majority of them are in force now?

A. I presume they are. I know nothing to the contrary; I presume the most of them are.

Q. You often received cash, I suppose, from Mr. Hill, from time to time?

A. Yes, sir.

Q. W*hat* that adjusted when you returned your accounts, according to his books?

A. Yes, sir; sometimes.

Q. He would advance you money in that way at your request?

A. Yes, sir.

Q. If you think of anything more on your accord, that I have not spoken of, state it now.

A. I don't know that I think of anything now.

Q. After Mr. Hill told you you could not go on, did you still furnish any applications to the company after that time?

A. I did; either one or two. There were several parties that were behind in their premiums, and he simply asked me to fix them up the best I could, and I went down on 'change for the company to see them and collect the money and fix them up. I took the renewal receipts of Mr. Hill. There was one or two. I don't recollect how many I got the money from, and I reported it; handed it in. And there was

124 another that refused to pay his money, Mr. John Ring. He said he wanted to make a change in his policy. He was carrying a policy of $10,000, on the ten year plan. He thought he ought to have more insurance for the same premiums, and he refused to make the payment. He said he would take a paid up policy, and take insurance elsewhere. I said it was a good company, and if he wanted ordinary life insurance, the New York Life would give it to him, and if he had not made up his mind to have an ordinary life policy I would try to reinstate him, or he could have a new policy. He then asked me to come up to his office in the afternoon. I went to his office and wrote him up $20,000 on the life plan, and gave him a receipt, and he paid me the money, about $500. I stated the whole transaction to Mr. Hill, and deposited the money in my bank, and Mr. Ring was examined by two physicians—a regular appointed physician of the company—they failed to renew him. The application was sent on to the company, and they refused to issue the insurance. Of course that was a damage to me in point of commissions, and I was forced to go to the company afterwards and get him his insurance. He took a paid up policy, and that policy he holds to-day; a $2,000 paid up policy. They simply declined to issue the policy, but gave no reason. I suppose they preferred not to reinstate it.

(Objected to by counsel for pl't'ff. The court sustained the objection. Counsel for def't then and there duly excepted to the ruling of the court.)

Q. After this conversation in which Mr. Hill told you you could not go on, you continued some time afterwards?

A. I did; with several parties. I assisted him with parties that would decline, and I collected this $500, and reported it to the company, and they refused to issue the policy, and I turned Mr. Ring over his money for his policy.

Q. Did you know anything at that time about the Bloess policy?

A. All I know about that is simply this: I saw Mr. Bloess. I
125 considered his premium became due in April, 1875. I met him down on Market street—no, it was on Exchange—and he spoke to me about his insurance. He said the policy would be due before long. He said he did not care, he wanted to change his policy. I told him to let it be at that time. I asked him when his insurance came due, and he said in September. Then I told him to come to the office of the company and I would fix it—to come to the office of the company, and if I am not there mention the matter to Mr. Hill, and he will fix it up; and I came back to the office and stated the whole circumstance to Mr. Hill. I told him the conversation I had had with Mr. Bloess about it, and asked him if Bloess called at the office to fix it up the best way he could. That was the whole transaction. His premium became due and was not paid; and he fix it up, and got a new application out of him, and sent it on in his own name, whereby I sustained a loss of $200 by commissions.

Q. Who had got his original application?

A. I had. He never would have been in the company if it had not been for me.

Q. State if any other policies were changed in a similar manner to that of Mr. Bloess', and which were accredited to you on the books of the company?

A. Well, there had been several changes made in the policies. Several parties changed their policies in form, and reduced their amount.

Q. What policies were so changed; the names of what parties?

A. Well, I don't remember, particularly, only Mr. Ring's; and the policy of my brother, and then another gentleman.

Q. What was his name?

A. John B. Boogher; it was reduced—it was $15,000, and it was reduced to $10,000, but my renewal interest of course remained intact. And several other small policies were changed, where they simply changed the form, but a new application was not taken.

126 Q. Can you give any other names besides your brothers?

A. No, sir; I don't remember, but I know there were several of them. These other things occurred at different times.

Cross-examined by Mr. JUDSON:

Q. Do you remember what was the first premium in that company that you collected?

A. Yes, sir; I think I do; it was $300.

Q. I mean the name of the policy holder?

A. A Mr. Brown.

Q. Was that the policy concerning which the company wrote you under date of December 11th; the letter introduced in evidence?

A. Yes, sir; December 11th or 13th; I forget which.

The COURT. What year was that?

A. 1871.

Mr. JUDSON. It is marked Exhibit No. 7.

Q. Then that premium you were allowed to keep the amount of it yourself as your commissions, were you not?

A. Yes, sir.

Q. That was in the neighborhood of $250?

A. Yes, sir; $247 I think, or $245.

Q. You did that on the authority of this letter of December 11?

A. I did that partly upon that. I submitted that letter to Mr. Hill when I received it, and he said it was all right; to collect the premium and use it as I pleased.

Q. That was the Brown premium?

A. Yes, sir.

Q. What was the next premium that you collected and appropriated?

A. The name I don't remember.

Q. About what time?

A. That was along in the course of the commencement of my business, after January or February; I think it was some time about that time that I found it was necessary to use any of the company's money.

Q. Now, as a matter of fact, when did you do it?

A. I don't remember.

Q. Do you know or remember what were the names of the policies?

A. I remember it was along about 1874.

127 Q. We are speaking now of 1872?

A. In 1872; I don't remember. It was something I kept no record of, and it is further back than I can speak of now.

Q. Did you appropriate any money to yourself for premiums in the spring or summer of 1872?

A. No, sir; unless it was by knowledge of the company.

Q. As a matter of fact did you collect money and retain it?

A. When I collected from some of the policies, as I said awhile ago, I was allowed to retain it.

Q. Do you give it as a matter of fact in, I mean, the Brown matter, that it was with the knowledge of the company? I want to fix that appropriation.

A. I don't remember any other that was advanced in 1872.

Q. Prior to the 8th of October, 1873, did you collect and appropriate any of the company's money for which you gave them a note?

A. You have an exhibit there, I believe.

Q. I believe your note is here.

A. There is an exhibit there showing some premiums which were used by me, and for which I signed those vouchers in April, 1873.

Q. Now this $1,000 that you took in this way, what was your authority for doing that? Mr. Boogher, state it specifically.

A. My authority for doing that was in this way: There was a portion of that money which, as I said awhile ago, were notes that were taken by agents I had employed.

Q. Well, how much was covered by notes?

A. I think some six or seven hundred dollars. I know that there were two premiums amounting to $500. And then there was Mr. Howard C. Walker.

Q. How much did that indebtedness make up?

A. About $500.

Q. Who were the other parties?

A. Another man's name was Omeroad; his amounted to about $60 or $70. I think the notes amounted $600 or $700. Then I had to pay some to my clerk, to whom I had guaranteed to pay a salary of $125.

128 Q. Who authorized you to guarantee that?

A. My contract authorized me to secure him as an agent.

Q. How much did all of that foot up?

A. The whole thing, including notes, amounted to $1,000.

Q. Were there any cash premiums in that account that went into that $1,000?

A. There may have been some. I don't remember.

Q. Then as a matter of fact was there any cash premiums so used in that account?

A. Very likely there was; but I don't remember positively that there were.

Q. I did not ask you that. I asked you if there were any?

A. I presume there were some premiums; I think there was some.

Q. How much?

A. I don't remember. I know that matter came up several times in conversation with Mr. Hill.

Q. I want to know what was your authority for appropriating that cash which was included in that $1,000?

A. My authority was simply from the company.

Q. What was that authority?

A. Well, it was—the authority was not in writing, as I said a while ago. It was given to me verbally.

Q. Verbally from whom?

A. A part of it was the conversation I had with Mr. Odell.

Q. You stated just now that a part of that $1,000 was cash for premiums?

A. I said it might have been.

Q. I want you to state now specifically your authority for so doing.

A. My authority for using those premiums was through and by Mr. Hill.

Q. State when it was you got it.

A. These things, as I stated a while ago, they occurred at different times.

Q. Fix the time; when were the periods?

A. I could not say.

Q. State what he said in any one of the periods.

A. He simply said it was all right; I could use it. He said it in that way.

Q. Did you tell him you had collected such and such cash premiums?

A. Yes, sir.

129 Q. That you collected certain cash premiums on April or October 8th, 1873, and you reported to Mr. Hill that you had collected them and appropriated them to your use, and Mr. Hill said "all right," is that your answer?

A. That is the sum and substance of it. I won't say what he said. I could not give you the language.

Q. Can you fix the time of any occasion on which he said that?

A. As I said a while ago, it was something that occurred every month.

Q. I want to know distinctly about this matter—any of these different times when you used the money. I ask you about the time of your collecting the premiums and appropriating them to your own use. I want to know whether this occurred prior to October 8th; and whether you reported it specifically to Mr. Hill and he said it was "all right."

A. I did to the best of my knowledge.

Q. Are you able to swear to it positively?

A. I know, as I said several times——

Q. Are you able to swear positively you reported these premiums to Mr. Hill and it was expressly agreed that you should retain the money?

A. Sometimes I would collect the premium—sometimes I would deliver the policy at the time of collecting the premium and then I would use that money and report it to Mr. Hill, and then perhaps in the next policy I would make it all right. Sometimes I would ask Mr. Hill first, "I have collected a $100 or $200; I would like to use the money, and I will make it good in my next report." Sometimes I would tell him first before using the money, and sometimes I would use the money before telling him, and whenever I did tell him he would assent to it.

Q. I want to ask you whether with these specific premiums that you collected in the fall of 1873, you had express authority to use it?

A. I presume I had. He said a dozen a times a month that it
130 would be all right, when things of that kind occurred. I can't say whether it was every day, every week, or every month, but I know it was very well understood between us.

Q. What was very well understood between you?

A. In regard to my collecting the premium and using it in that way.

Q. Was it very well understood that you could at your convenience use the funds of the company for your private purposes; was that distinctly understood between you and Mr. Hill?

A. That was the sum and substance of it.

Q. *What* that every specifically agreed to between you that you should have the right to use these funds for your specific purposes?

A. As a matter of course, it was.

Q. Will you give one occasion when that was agreed on?

A. I remember most postitively when this last exhibit here was spoken of, I spoke to Mr. Hill about it.

Q. Tell me the time.

A. Well, that was in the spring of 1875; the last business I did for the company.

Q. What did you say to Mr. Hill?

A. I said to him that I had collected that money. I think it was

at one time when I had given a receipt for the first premium. The policy was afterwards changed to an ordinary life policy. I said to Mr. Hill I had collected that premium and I wanted to use it, and I would want to use it in my next report, and he said it was all right.

Q. Did you have a general agreement with Mr. Hill while acting as agent for the company that you could use the company's money for your own purposes?

A. I will say, I had carte blanche to use it from time to time.

Q. I want you to fix the different times when you got the carte blanche?

A. I could not do it.

Q. Was there any person present when you you got this carte blanche?

A. Not that I know of; the book-keeper might have been there.

Q. Was it thoroughly understood between you and Mr. Hill
131 that you could, whenever it agreed with your interests, use the company's funds?

A. Yes, sir.

Q. You say you had a conversation with them in the spring or winter of 1873?

A. I will say this, it was most positively understood between the company and myself, and Mr. Hill represented it.

Q. Was that agreement in writing?

A. No, sir; it was verbal.

Q. Your written contract calls for prompt payment of the premium?

A. Well, I made payments of the premium, and I made it a rule to report to them promptly if I did not pay them over.

Q. You spoke of an interview with Mr. Odell and Mr. Hill in the winter of 1873, during the holidays. You state what was said at that interview?

A. I don't remember the exact conversation, but I know it was thoroughly understood in the beginning of it, because I didn't want any trouble about it afterwards. I told them whenever I needed the money I proposed to have it.

Q. Did you tell them how you proposed to have it, by collecting and keeping the premiums?

A. Well, that was a matter that would probably come up afterwards, and Mr. Odell told Mr. Hill then and there when I needed anything of that kind it was all right.

Q. Needed anything of what kind?

A. Needed advances of money; needed my necessary expenses.

Q. Now we will come down to the 16th day of December, 1873, "cash $1,028;" was not a part of that money for premiums you had collected?

A. Very likely it was.

Q. Do you know how much?

A. No, sir; I do not. You probably have the vouchers for it. I don't remember that I signed these vouchers. I never thought of them afterwards.

Q. When you collected money from parties, did you always report it promptly to Mr. Hill?

A. Well, I could not say that I would.

Q. Didn't you testify in your direct examination that you always would?

A. I might have said so. I never was required to report the
132 money until after the policy was delivered; I frequently took a bundle of receipts, as I say, and sometimes a policy would not be

delivered for six weeks or two month'. There might be delay on the part of the company, and sometimes the money would be lying in bank for a month or six weeks, and I was not required to report the premiums until after the policy was delivered, then I would make my report.

Q. Well, after the policy was delivered, how soon would you make your report?

A. Sometimes the next day. Sometimes the very day. I always had a margin to make out my report. I always had my report made out to come in on the 5th day of the month, and I frequently would have the money in bank until then in order to keep up my bank credit. If I turned the money over immediately after I collected it, he would deposit it in his bank; the money would not be used or reported by him until then.

Q. How long time did ever elapse, do you think, that you let it lie in store without reporting it?

A. That is a matter I could not answer.

Q. Would you always pay the money when Mr. Hill asked for it?

A. I don't think I did. Sometimes I collected premiums long about the time he would send off his report. He always tried to get his report off by the 5th or 6th of the month, and if I collected the premium, say on the 5th or 6th, I would say to Mr. Hill that I wanted to use that money, or I preferred to let it lay there till the next month, and put it in the next report.

Q. Did you always put it in the next report?

A. Sometimes I did and sometimes I did not.

Q. Sometimes, in fact, you would let it lie over the second month?

A. No, sir, I can't say that; I always had it ready at the end of sixty days, and reported it when the sixty days expired. If I did not have the money I would get it and turn it in. I have done it frequently.

Q. Were there any occasion' when you did not turn it over?

A. Yes, sir.

133 Q. Now, in 1874, do you remember the policy of Mr. Weiss?

A. Yes, sir; I remember that very well.

Q. And George Baine's?

A. I remember of procuring George Baine's, very well.

Q. Do you remember what time in the year those policies were placed?

A. No, sir.

Q. Do you remember what time in the year they were reported to Mr. Hill?

A. No, sir. That was something I never kept any account of at all.

Q. Did you have those premiums as long as three or four month' without reporting them?

A. I might not have reported them until the next month, but I reported them then in some shape or another to Mr. Hill.

Q. Do you remember of collecting Mr. Weiss' premium in July, 1874, and not reporting it until September?

A. No, sir; I don't remember anything of the kind and I don't think it was so.

Q. Do you remember of collecting that premium at all?

A. It might have been that I collected it. I frequently collected them. I would collect the premium for Mr. Hill. He would turn a number of renewal receipts to me at one time, it might be.

Q. Do you remember that one time?

A. I don't remember any specific dates.

Q. So you can't state how long you did keep the money without reporting it?

A. Sometimes a week or two weeks, or a month or six months. If I had a balance in bank, and I did not have any use for the money, but I generally needed the money to pay my necessary bills, as it was understood between me and Mr. Hill, from time to time, I could keep it there, I would pay it promptly.

Q. What do you call your bills?

A. My private expenses.

Q. So you regularly retained the money of the company according to the condition of your private family account?

A. No, sir; not at all.

134 Q. Well, I want you to explain that.

A. It was understood all the while——

Q. No matter what you understood.

A. I had authority to do it.

Q. The question is now as to what you did?

A. I will answer your question the best I can.

Q. I want to understand how you regulated the turning over of the funds—if it was according to the condition of your personal finances; what was it you regulated it by?

A. It was regulated by circumstances.

Q. If you had an object for the money you kept the company's money, did you?

A. As I said awhile ago, I would use their money from time to time.

Q. If you wanted to use it you would use it?

A. If I thought proper to I used it, but it was always done with authority.

Q. In regard to this matter of five dollars charged to you, how do you say that charge was made?

A. I have clearly stated all about that.

Q. In the spring of 1875, when you say Mr. Hill declined to give you policies, did you then refuse to go on and do business for the company?

A. Yes, sir; I refused to go on as a matter of course. I could not go on.

Q. You say he refused to allow you to go on?

A. He refused to allow me to collect the premiums or deliver the policies.

Q. When you refused, what did Mr. Hill say then about that; when you said you could not deliver the policies?

A. I don't remember what he said then. There was probably some allusion to the amount of money that I had appropriated. He said that he had received a letter from the company in regard to these vouchers, and they did not want to have things in that shape.

Q. Did he at that time tell you you could not go on?

A. Yes, sir; he did. He told me he had received a letter from

135 the company not to allow me to go on, and then I declined to business.

Q. He said he had received instructions from the company?

A. He said he was authorized by the company to say to me that he was instructed not to turn these policies over to me for collection, or something of that kind.

Q. Did he say anything more then?

A. Well, I don't remember the exact conversation now. We had quite a talk about it.

Q. Did he tell you you could take policies and go on and do business?

A. No, sir. Afterwards he wanted me to take some and deliver them and I refused to do it.

Q. Did he tell you at that time you could go on and pay up what you owed the company?

A. I don't remember. I think I had already given vouchers for it at that time.

Q. What do you mean by vouchers; acknowledging you had received the money and appropriated it?

A. Yes, sir.

Q. What was the date of that conversation?

A. That was in the spring of last year.

Q. What time?

A. In either May or June; I think it was May.

Q. Was it before or after signing these vouchers that you took the Meyers policy?

A. I don't remember whether it was after or before. I did not charge my memory with it. I know when he asked me to sign these papers I did not hesitate at all.

Q. I want you to fix the date of that conversation when you say he would not allow you to go on.

A. I think that date was—I know it was—in the spring of 1875.

Q. Did you do any business for them after that?

A. I collected several premiums at his request of parties that declined or would not pay their premiums. After that I declined to attend to it.

Q. Did you give any reasons at that time?

A. I don't know that I did.

Q. Well, did you get any risks after that time?

A. None, except the risk of John Ring I referred to a while ago; that is, that I gave to that company after he did a certain thing.

Q. What do you mean by a certain thing?

136 A. I mean the delivery of my policies and the collecting of my premiums, and they refused to issue on the life of Mr. Ring; they finally issued it to Mr. Price.

Q. The point I want to get at is whether the company at that time, when you say they refused to let you go on, whether they did anything more than to decline to give you policies to collect; did they do anything else?

A. Well, at that time they simply refused, as I said, to turn over those policies to me.

Q. Did they do anything else?

A. That is all they did. This conversation all occurred about the same time; it was all about the same time. I said to Mr. Hill I thought the company was doing very wrong by taking possession of all of my policies and not let me deliver them, and then come to me after that and want me to take these policies and deliver them. I told him then it would not do.

Q. Do you say afterwards you took a number of policies and delivered them and collected the premiums?

A. I did, for I felt inclined to cover over the breach they had broken. I thought I could deliver these policies Mr. Hill gave me on change. When the policies had been placed by me it placed me in a very unpleasant condition.

Q. Do you know any reason why the company refused to deliver to you the policies to collect?

A. No, sir.

Q. Was it told to you at that time?

A. No, sir.

Q. Did they express a willingness at that time for you to go on and

collect your premiums and everything else, if you would pay up everything you owed?

A. No, sir.

Q. Was it or was it not stated to you that by paying up what you owed the company that they would go on and deliver your premiums to you to collect?

A. No, sir. After turning me off Mr. Hill came to me and wanted me to go on.

Q. You don't say that he did not say anything of the sort? Are you sure that he did not say that?

A. I don't remember anything of the kind.

Q. Was there any demand made upon you at that time for
137 what you owed the company?

A. There may have been.

Q. Do you know whether there was or not at that time when they refused to give you these policies?

A. I don't remember whether there was or not; there might have been. I know we had quite a talk over the whole matter.

Q. At this time, Mr. Boogher, did the company express a willingness that you should go on and pay up what you owed?

A. No, sir; they did not do anything of the kind.

Q. Do you swear, then, that the company made no demand upon you for what you owed them at that time?

A. They did when I was in New York.

Q. Before that?

A. No, sir.

Q. Was there anything said about what you owed them?

A. As a matter of course there was.

Q. Don't you know, as a matter of fact, that the only question between you and the company is the question of your indebtedness to them?

A. No, sir; I don't know it.

Q. Is there any other question?

A. As I said awhile ago, and I intended to explain it——

Q. Do you know of anything further?

A. No, sir.

Q. Did you hear any other spoken of?

A. No, sir.

Q. Did you ever hear anything further stated by Mr. Hill?

A. I can form my own conclusions.

Q. Did you hear any other word mentioned?

A. I don't say that I heard that mentioned.

Q. Did you ever offer to take these policies and then pay up what you owed the company?

A. After I had talked with Mr. Hill, and after the company had taken steps against me to prevent me going on and collecting the premiums and so on, I asked some explanation about it, and we talked the matter over considerable, and after the lapse of a few days he, of course, saw they were acting wrong, and he wanted me to overlook or look over the whole matter.

Q. What did he say?

138 A. He came to me and wanted me to look over the whole transaction and go and deliver policies as before, and pay up the indebtedness.

Q. What did you say to that?

A. I simply said I would not do anything of the kind.

Q. Why not?

A. I did not propose to do anything of the kind after being subjected to such treatment.

Q. Did you make any demand on him at that time conditioned on your going and doing business?

A. I went to New York to see if the company was going to have the whole matter straightened up.

Q. Did you make any demand on them or tell them that you would not consent to go on and do business unless you had advances guaranteed to you?

A. That matter was—I will answer that in my own way.

Q. Answer it yes or no, whether you did not demand, as a condition of your going on, the guarantee of advances to you?

A. I don't know that I demanded anything of the kind.

Q. Did you say anything of that sort was or must be the condition of your new arrangement?

A. I don't remember what my remarks were.

Q. Do you remember whether you did or not?

A. I know——

Q. What is the fact as to whether you asked that as a condition of them and all that sort of thing?

A. The company broke my contract.

Q. That is not the question.

A. I will come to your question directly.

Q. The question is, whether during that summer you required, as a condition of your going on with your contract, that you must have advances secured to you from the company?

A. I can't answer positively as to the character of my letters. There was a correspondence between us, and Mr. Wheaton, superintendent of agencies, was sent on here by the company to adjust our difficulty, but we could not agree upon a plan of adjustment.

Q. Then you don't know?

A. No, sir. I had a conversation with Mr. Wheaton—we talked the whole thing over. I went to his private room, and he told me,
139 says he, "Mr. Boogher, I fully appreciate"——

(Objected to by pl'tff. The court overruled the objection. Counsel for pl'ff then and there duly excepted to the ruling of the court.)

WITNESS. He was sent here by authority of the company to fix that matter up. He told me so.

Mr. BARCLAY. Go on and finish your answer. State what that conversation was.

A. We talked over the amount of my indebtedness. He admitted that some things had occurred that ought not to have occurred, and that had created some unpleasantness, but he said he was here to fix matters up, and that he wanted me to go on and remain in the service of the company; that I had done a good business for it, and they did not want to lose me. Says he, "This money advanced here from time to time, the company fully understand your position in that matter, and have understood it, and it is all right. We want to fix matters up; we want you to go on here." Says I, "I feel sore over the treatment of the company." "Well," says he, "we will pay you anything that is right." Says I, "If you will make advances upon renewal commissions, guarantee so much to me, I will be willing to go on." He went back to New York, and I got word from the company that they had authorized Mr. Hill to negotiate with me.

Q. Was that by letter?

A. That was by letter. They made me a proposition, but I did not accept it because I could do better. They went on and broke my contract and through me out of business, and I was compelled to do business for another company because they would not take it.

Mr. JUDSON. Q. When did you commence doing new business for any other company?

(Objected to by counsel for def't. The court overruled the objection. Counsel for def't then and there duly excepted to the ruling of the court.)

A. I gave them a written notice six weeks——

Q. When did you go to work for any other company?

140 A. I believe my contract dates the first of November, 1875, or maybe the 20th.

Q. I think last evening you were asked the question about going to work for another company. Had you finished your answer?

A. I think I want to make an explanation in regard to one thing I said last night. I said I declined to go on with the company. It was at the time Mr. Hill notified me I could not take my policies for delivery, &c. You asked me if that was the only reason why I refused to work for the company. I don't think I explained that at that time. The conversation in regard to the matter referring to some order of the company refusing to allow me to go on and deliver policies, you asked me if that was the only reason why I declined to go on and work. I believe I said "Yes," but that referred to the conversation at that time. With regard to this Bloess policy, that matter came up a day or two afterwards, but their refusing to allow me to collect my premiums from time to time was the main reason; but the whole thing did not hinge exclusively on that one act. I simply want to be understood on that point, because these matters came up at different times. The Bloess matter came up two or three days afterwards. When I found that out, I spoke to Mr. Hill about it and objected to anything of that kind. He said they had a right to do it, and, whether I liked it or not, he would do it.

Q. I understand you to say that the Bloess matter occurred subsequent to the time they declined to let you go on with the matter of the premiums?

A. I was speaking about my finding it out.

Q. Had you refused to go on with your work before or after you found out about the Bloess matter?

A. Well, I don't remember the time that they refused to turn over those policies to me, but, after his refusing, a day or two afterwards he came to me and wanted to know if I was going to take those poli-

141 cies and deliver them. I remarked that I would consider it, and a day or two after that then this Bloess matter came out. I found out that his application had been taken, the policy delivered, and the premium collected before I knew of it, when the reward should have been turned over to me and the premium collected by me; but it was not done, and when I found it out I spoke about it. And when that was done the question about collecting renewal premiums came up.

Q. Had that ever come up before?

A. Yes, sir; a dozen times, I suppose.

Q. Had Mr. Hill ever refused to deliver your renewal receipts for collection?

A. As a matter of course, he did. The renewal receipts were sent in his name.

Q. Give some instance where he refused to give you your renewal receipts for collection.

A. Well, it was a general order. It was all the time.

Q. Can you give any special instance?

A. I don't remember any special time any more than the general order, or in a general way.

Q. All you know is in a general way?

A. As I said here yesterday, I can give no special instance, for I have no dates.

Q. Now, when did you go to work for the other company?

A. My contract dates the first of November, 1875.

Q. Was that the time you commenced to work for them?

A. That was the time I entered into a contract with them.

Q. What time was it when you commenced work?

A. I think the superintendent of agents was here in October, and I went with him on 'change, and introduced him around to several parties, and I think he took several applications while he was here.

Q. Did you do any work?

A. I assisted him just that way, long in the latter part of October.

Q. In other words, you assisted him to get applications for other companies, while the renewal commissions were being accredited up to you in the New York Life?

A. I assisted——

142 Q. That is a question that requires an answer one way or the other.

A. As I said——

Q. Did you or didn't you work for any other company while your commissions were being accredited up to you in the New York Life?

A. Well, I don't know that I did.

Q. Did you do any work for any other company in the month of October, 1875?

A. Not that I remember.

Q. For no company?

A. Not that I remember; no, sir.

Q. Can you swear you did not?

A. I don't think I did.

Q. Didn't you just swear you went around with the general superintendent in the month of October?

A. I say for the Maryland Life.

Q. I am referring to the New York Life.

A. I did not understand you.

Q. When did you commence doing work for the Maryland Life?

A. I think it was long about the latter part of October.

Q. When did you leave the New York Life?

A. I left the office, I think it was about the latter part of October.

Q. Did you have a desk in their office before that time?

A. I had a desk in the office in which I was running an insurance bureau.

Q. Where was that?

A. On Sixth and Olive.

Q. Who were you with?

A. With a Mr. Miller.

Q. What was his first name?

A. Mr. John S. Miller.

Q. When did you go into that office?

A. I think I took charge of that bureau, I think it was in the fall, August or September, after I returned from New York, early in the fall of 1875.

Q. Did you have that office before you went to New York?

A. Only to receive my mail. I transacted my business in the New York Life. Their books will show certain business I turned in—applications.

Q. The question is, when you took the office at the outset.

A. I am giving the answer to that question just now. When I went to New York, I wanted to get matters fixed up and continue with the company if I could. After I came back from New York and after having the conversation with Mr. Hill, I served a notice on the company
143 through him giving them six weeks to adjust my account. I notified them if matters were not settled by that time, the 1st of September, I would connect myself with another institution.

Q. I asked you when you took the office at the outset.

A. That office was the office of John S. Miller & Co., and was entirely separate and different.

Q. When did you first get your mail at that office?

A. It was in the spring.

Q. Before or after the time when Mr. Hill declined to give you these policies to collect?

A. When I first began to receive my mail there?

Q. Yes, sir.

A. It might have been before, or it might have been afterwards.

Q. Who composed the firm of John S. Miller and Company?

A. Well, I was supposed to be the company.

Q. Anybody else?

A. No, sir; the New York Life knew all about that. I consulted with Mr. Hill before I went in there.

Q. Now, when did you go to New York?

A. I went along some time in July; I don't remember the date.

Q. Do you remember what time in July?

A. No, sir.

Q. When did you come back?

A. I don't know that either. It may have been in the latter part of July or the first of August; I don't remember; my letters will show; the letters I wrote to Mr. Hill. It might have been the middle of July, or probably the first of August.

Q. When you came back from New York did you have any conversation with Mr. Hill?

A. Yes, sir.

Q. Do you remember what time it was you came back from New York and had a conversation with him first?

A. No, sir; I do not.

Q. Were you referring to Mr. Hill as the party you could make all necessary arrangements with with the company to go on?

A. That was in conversation with Mr. Odell. After talking over all the matters with regard to policies, &c., one thing and another,
144 Mr. Odell said to me he had turned the matter over to Mr. Hill, and then this Bloess matter came up.

Q. I asked you whether or not you referred to Mr. Hill as the authority to make arrangements with you?

A. I was; we had a talk.

Q. After you came back to St. Louis you went to see Mr. Hill, did you not?

A. I did; but I don't think I called to see him before I wrote to him. I had been requested by the company—that they had informed me that my accounts had been referred to him.

Q. In this conversation with Mr. Hill after your return in August, 1875, what did you ask on your part?

A. I simply asked the fulfillment or carrying out of my contract.

Q. As it then stood?

A. Yes, sir; I was perfectly willing to go on.

Q. What did you ask about advances?

A. I asked, also, the advances.

Q. At this interview with Mr. Hill, after you came back from New York, what did you say about advances?

A. We had some talk about advances even before that time.

Q. I want to know what was said then.

A. We had talked over the other matters that had been referred to him——

Q. Just state what was said between you on that point. Did you say you wanted advances?

A. Well, the company agreed through Mr. Hill to so much advances per month.

Q. How much advances did you want?

A. The advances he offered.

Q. How much did you want or ask for?

A. Well, I think it was probably $150 or $200 a month; somewhere along there, or probably it would amount to a little more; I don't remember exactly.

Q. Did you say you could not go on unless you had the advances?

A. I don't know but I did.

Q. Did you say anything about that at all?

A. If I did it might have been connected with his proposition. The advance was entirely based upon other matters.

Q. Didn't you state to him it would be impossible for you to work under your contract without having advances guaranteed?

A. I don't think I did under the old contract.

145 Q. You say you don't think you did make that condition?

A. The thing did not hinge on that at all.

Q. Did you make that a condition at all?

A. That advance was entirely based upon the compliance of the company in regard to other matters of my contract.

Q. I don't want to know about other matters.

A. It all hinges together.

Q. I understand you to say you never insisted on advances as a condition of your going on?

A. It may be I did.

Q. Did you at any time in a conversation with Mr. Hill insist upon advances—monthly advances?

A. Very likely I did, sir.

Q. Now, sir, did Mr. Hill at this interview and conversation after you returned from New York agree to this idea of advances on any condition?

A. Yes, sir.

Q. What were those conditions?

A. Well, he agreed to make those advances.

Q. Under what conditions?

A. Well, it was contingent upon my going on and working for the company.

Q. Anything else?

A. Well, we talked the whole thing over.

Q. Was there anything else; any other condition to your getting that advance?

A. On my part?

Q. Yes, sir; on the part of anybody.

A. I was to be secured in the privilege of collecting my renewal premiums.

Q. Was there anything else to be done on your part?

A. No, sir.

Q. Was it or was it not a condition that your sureties were not to receive the advances?

A. No, sir.

Q. Was there anything said about sureties?

A. No, sir; not until afterwards. We talked over the whole matter, and we agreed upon a line of action; after that Mr. Hill presented an account of $1,500 to my sureties. He wrote them and wanted them to acknowledge an indebtedness on my part which I totally disclaimed.

Q. Did that letter admit you owed them that account?

146 A. After he wrote that letter to my sureties my sureties refused to let me have the advances.

Q. Did Mr. Hill ever propose to you to let you go on and receive the advances from the company by paying so much a month from your renewals, and your sureties should be apprised of that fact?

A. That matter was simply spoken of, but later, until that letter was written.

Q. Did he ever mention that to you?

A. Not that I remember of, until that letter was prepared.

Q. Did he then mention it to you?

A. Yes, sir, he did; after that letter was mailed to my sureties.

Q. What did you say about that?

A. I told him that the company held my renewal contract, which was worth a considerable money, and I did not see why they should hesitate to make me the advances agreed upon. I thought they were amply protected in it, and I presumed my sureties would object to my going on. I was perfectly satisfied on that.

Q. Didn't you tell him that your sureties would not object to your going on and receiving advances?

A. I don't remember about it. I did not talk to my sureties until that letter was written; the whole thing had been agreed upon, in fact, prior to that.

Q. Did you ever see that memorandum, Mr. Boogher? (Hands paper to witness.)

A. I don't remember whether I saw that document or not. I have seen a document similar to that.

Q. You can't say whether you ever say that or not?

A. Not that document; no, sir. I know we had a very general talk about matters at that time.

Q. Do you remember any document of the same purport as this?

A. I think there were two papers, probably, that Mr. Hill referred to about that time.

Q. Did you ever take this paper with some report from Mr. Hill, and take it home with you and bring it back the next day to Mr. Hill?

A. No, sir; not that I remember.

Q. Do you remember of taking it home?

A. No, sir.

147 Q. Are you certain you did not do it?

A. I don't think I did. Mr. Hill said nothing as to what was in that letter, the contents of it, that I remember.

Q. Well, during the summer of 1875, prior to your going to work for the Maryland Life, did you do any work for any other insurance co.?

A. Well, I might say that I did.

Q. Well, for what company?

A. I put some insurance; there was Mr. J. N. Tressler, he refused to take it in the New York, and I put him in the Massachusetts Mutual.

Q. Did you put any other parties in there?

A. I put in some $20,000 on Mr. Broker about the fall of 1875.

Q. Did you get any risks for any other company?

A. No, sir.

Q. They were the only companies in which you placed risks—the Massachusetts Mutual and the Maryland Life?

A. Yes, sir; all I remember of.

Q. Are you certain?

A. I placed some in the New York Life.

Q. In any other company?

A. None but the Massachusetts Mutual and the Maryland Life, that I remember.

Q. What was the character of this business done by John S. Miller & Co.?

A. It was an insurance bureau for the collection of claims; insurance claims; for the collecting and surrendering of policies, and getting paid-up policies, and matters of that kind; simply a general insurance business.

Q. Did you place any risks?

A. Yes, sir; some in the New York Life. I left the care and management of it mostly to Mr. Miller.

Q. When did you become a party to it?

A. I was a party to the concern when it first started, indirectly.

Q. When was that?

A. In the spring of 1875, I believe. My connection with that bureau, I might state, was with the view of increasing my New York Life Insurance business. That was the object of it. I wanted the business to increase my general insurance. It was fully understood.

Re-examined by Mr. BARCLAY:

148 Q. State to the court the time the original breach, as you call it, occurred.

A. Yes, sir; the original breach occurred in April.

Q. April was the time they refused to let you collect your premiums?

A. Yes, sir; but it was understood by the New York Life; I talked with Mr. Hill about it; he assented to it; I would go to John S. Miller's office to receive my mail, and attend to my insurance business at the New York Life.

Q. You say you told Mr. Hill all about this bureau, as you call it?

A. Yes, sir.

Q. And he assented; had no objections to it?

A. Yes, sir; he said there was no doubt but what the company wanted business, and he saw no objection to it. Besides, there was an agreement; Mr. Taylor drew up thea greement. I want to explain my connection with the New York Life.

(Objected to by counsel for pl'ff.)

WITNESS. That agreement has been lost.

Q. Who had the agreement?

A. It was at the office; drawn up by Mr. Taylor. It was simply to protect my interest in the New York Life. I dont know where it is today.

Q. It is lost, so far as you know?

A. Yes, sir.

Q. Well, state the contents of it.

A. I don't remember the exact words of it; it was drawn by Mr. Taylor; I was simply a party to the concern with Mr. Miller.

Q. Will you state what the agreement contained?

A. Mr. Miller was to manage the concern. He was to attend to the whole of the business of the bureau, and was to receive two-thirds of the net profits, and I was to receive one-third, and he was to have the exclusive control of the management of the business. And the agreement went on to state that the business was not to conflict with my business with the New York Life in any way, shape or form so far as the New York Life was concerned. The business of Mr. Miller was to get applicants and turn them over to me, and I was to pay
149 him a broker's commission, the same as I would an insurance agent or any other for bringing in an application, and it went on in that way and give a full outline of the plan. I told Mr. Hill all abou it, and the whole thing was thoroughly talked over between Mr. Hill and myself.

Q. Was this done with the knowledge and consent of Mr. Hill?

A. I said I told Mr Hill all about it, and he said, "all right;" the company, so far as he knew, had no objections to any thing of the kind, and I did devote all my time to the New York Life during my connection with it. I gave them several applications, which their books show.

Q. That letter, which was the only letter written to the sureties, was written in September?

A. Yes, sir.

The COURT. Is that letter here?

Mr. BARCLAY. Yes, your honor.

Q. After this letter was written in September, and this proposition to the securities had been made by Mr. Hill, were you, from and after that time, ready and willing to proceed with the company?

A. Yes, sir; I always was.

Q. You always held yourself in readiness from that time?

A. From that time up to the time I connected myself with the Maryland Life.

Q. Mr. Hill himself refused *refused* to let you proceed?

A. Yes, sir; if they had complied with the terms of the contract, I would have been willing to do it. I never would have stopped. I had no reason other than that to quit the New York Life.

Q. Did your securities on this bond have any knowledge about this transaction between you and the company in regard to loans which were made from time to time from the company?

(Objected to by counsel for pl'ff as incompetent. The court overruled the objection. Counsel for pl'ff then and there duly excepted to the ruling of the court.)

A. No, sir; I guess not. All the notice that they received that I know anything about was that written notice last fall.

150 Q. Did you ever inform them of these transactions?

A. No, sir; I was not in the habit of reporting to my bondsmen if the company loaned me $150 or $200.

Q. So you did not notify them?

A. No, sir; I don't think I did. Last spring when some negotiations

were going on between the company and myself, I mentioned the matter to one of my brothers at Henry Bell's.

Q. Was that after the loan had been made?

A. That was afterwards.

A. If was after the loan had been made?

A. Yes, sir.

Q. We don't care for that. Were there other policies issued by the company, with the exception—I mean those sent in by you—of those mentioned in their list of credits—are there any omitted credits; in other words, do you know or can you tell any specific one?

A. Well, I did not examine the account fully. I could not make any head or tail to it.

(Objected to by counsel for pl'ff.)

Q. Did you find any commission for Mr. Brown's policy?

A. I did not see where there had been any credit for the Brown commission at all, the first commission.

Q. What was the commission on the Brown policy?

A. The first commission on the Brown policy was between $75 and $80.

Q. Are there any other premiums besides the Brown premiums?

A. It is simply this: there were some policies in force that had been taken during the early part of the spring of 1875, or in the early part of the year 1875, when they paid their premiums quarterly, and I only received credit for that part of the premium.

The COURT. Do you mean to say, where a policy was out and the premiums payable quarterly, you received the first quarterly payment, and you did not take your entire commission for the year from that payment but took it quarterly?

A. I took it quarterly as the premium was paid.

151 Mr. JUDSON. I want to know when Mr. Hill would not give you those policies to collect?

A. I could not say. The answer alleges in June. The first time was in April, as I remember it, but I could not state positively.

Mr. THEODORE BLOESS, having been duly sworn, was examined on the part of the defendant, and testified as follows:

Q. You are insured in the New York Life?

A. Yes, sir.

Q. Have you more than one policy?

A. Yes, I have got two policies there.

Q. Do you recollect the circumstances under which you took out the second policy?

A. Well, yes; I wanted to have an entire change.

Q. State all about it.

A. I took it on the Tontine plan at first, but I misunderstood the whole thing; then, at the end of the first year, I had it changed.

Q. What person was it that took your original insurance?

A. Mr. Boogher.

Q. Explain, if you can, fully the circumstances which occurred in connection with your second insurance. To whom did you speak about it first; and what was done after that; tell the whole story?

A. To the best of my recollection I saw Mr. Boogher a little before the second application was made, near the German Savings Institution on Market street. He spoke a few words about it, and said I could get it changed, and, if I recollect, afterwards I went to Mr. Hill to see about it.

Q. Did Mr. Boogher tell you anything about going to the office?

A. No, sir; he did not.

Q. There was nothing said about that?

A. No, sir. I spoke to Mr. Hill about it, and Mr. Hill came down to my office and got me to insure on the non-forfeiting plan, but the whole of the $700 or $800 I had paid was lost to me, and I went up to Mr. Hill's office again and made the first payment. At that time I enquired for Mr. Boogher, and Mr. Hill told me he is not in his office now;
152 he is doing a general insurance business; he has moved away from here.

Q. Was that at the time you made the first application?

A. It was at the time I made the first payment on the second application. Mr. Hill came down to my office and I went down to his, too.

Q. When you called at his office, then, the statement was made by Mr. Hill of Mr. Boogher having left the office?

A. He had left the office and was doing a general insurance business.

Q. Can you recollect about what time that was in the year?

A. It must have been when I went to make the first payment; somewhere about that time.

Q. When was that, do you think?

A. Some time in May.

Q. Did you ever say to Mr. Hill you did not want Mr. Boogher about you?

A. No, sir. I may have said it to Mr. Boogher; he was always talking business to me, out of sense.

Q. You did not say you did not want him to come down to see you?

A. No, sir; I don't think I did. He was a great fellow; if I was busy he would stick to me pretty well, and got the insurance out of me. There is no doubt he made great exertions to get some insurance.

Q. When you and Mr. Boogher first talked about this matter on Market street, did Mr. Boogher say to you to wait till your next premium fell due and then call at the office?

A. Well, I don't recollect that exactly.

Q. Did he tell you to call at the office about it?

A. Well, I don't know whether he did or not; I could not say.

Q. You are positive he spoke to you about a change?

A. He told me I could make a change.

Q. What did you reply?

A. I don't remember what was the reply; that I would come and see him, or something of that kind.

Q. Did he tell you to come to the office?

A. No, sir. I don't recollect it. I went to the office and saw Mr. Hill.

153 Q. Did Mr. Hill say anything about Mr. Boogher in that conversation?

A. No, sir; I don't recollect anything about it. Some time in April, I recollect, Mr. Hill came down and took my application.

Mr. R. C. ARENDT, having been duly sworn, was examined on the part of the defendant as follows:

Defendant offered this evidence on the question of damages and counter claim.

Q. Please state your name in full, and business.

A. My name is R. C. Arendt; I am an actuary.

Q. How long have you made actuarial calculations a special business?

A. I have been more or less engaged in the business for the last eight years.

Q. I will ask you whether you have examined the list of Mr. Boogher's applications for insurance in the New York Life. Have you examined this list?

(Here the list, being Exhibit No. 26, was shown to witness.)

A. Yes, sir.

Q. You have examined that list of policies?

A. Yes, sir. These are the lists from which I made my calculations.

Q. Look at these contracts, marked Exhibits A and C.

A. This is one of the contracts; I have seen two.

Q. Here is the other.

A. Yes, these are the papers.

Q. This first list applies to the first contract?

A. Yes, in November 1, 1871, and proceeding all along to the second contract.

Q. Now, I will ask you if you have estimated the value on the first day of March; or what time did you estimate your calculations from—September, 1875?

A. I believe it was either May or September; I can't state exactly. I see from the page, May, and then afterwards it is September, 1875. That would make a considerable difference; a difference of four or five months. It would not vary the value more than $150 or $200.

Q. I will ask you to state the present value of the renewal commissions under the first contract at that time; that is, at the time of the alleged breach?

A. $2,527.65.

154 Q. What was it under the second contract?

A. 2,790.

Q. What was the total amount?

A. $5,317.65.

Cross-examined by Mr. JUDSON:

Q. I wish you to state your method of computing these valuations; the first contract; the present valuation of the commissions; take it for five years; the fourth year of the renewals?

A. Yes, there are four renewals.

Q. Will you state to the court how you proceed to estimate that first valuation?

A. If, for instance, I find the total annual commissions of the business shown by the first contract amounts to $1,000, then I make the estimate——

The COURT. Is that a supposition you are giving?

A. No, sir; but $1,000 is more easy to talk about. It would be the same with any other amount. I find, by estimating from local statistical tables, partly compiled by myself, and partly taken from the Insurance Journal, how much of this amount will due in January, or at the anniversary of the time of renewal, namely, of the policies that have paid the first premium a certain number will lapse during the first year or will not renew. It is estimated that out of $1,000 of premiums, about $761 will be paid the second year, and only $591 the third year, and $498 the fourth year. These are figures obtained from statistics with reference to all the companies doing business in this country, in the United States, or nearly all. These renewal premiums are discounted at a rate of interest which I assume to be six per cent. compound interest for one, two, and three years, respectively. When this calculation was

made I assumed the premium fell due on the last day of the year; then at the end of the calculation there was due a small allowance in consideration of the fact that these premiums fell due at all times of the year.

I think some of them were discounted perhaps three months too
155 much, and others four months, and others five months, all along, and a small allowance was made. The notes of the company enter into the second calculation under the second contract.

Q. In the first calculation you did not take the note or overdraft of a $1,000. What figures did you go by other than contained in this list?

A. I don't understand your question exactly.

Q. What did you take as your list of policies?

A. I took that list; the principal list. It shows a premium of $07000.

Q. You assumed in the basis of your calculation that these policies were in force at the time of the breach?

A. Yes, sir.

Q. Whether or not any of these policies had lapsed before that time, you don't know?

A. No, sir.

Q. Whether or not any of them had died before that, you don't know?

A. No, sir.

Q. I suppose the same answers apply to the other calculations of the other policies?

A. Yes, sir.

Q. You assumed that those policies were all in force at the time of the alleged breach?

A. Yes, sir; I have sometimes, I think in several instances, had handed to me lists of the character in which all the lapses and discontinuances that had actually taken place had already been eliminated; then the methods of calculation are slightly different; because if I have handed to me a list of the entire policies taken by an agent, the lapses I assume in my computation will be a considerable higher than the computations in which all the eliminations have already been made.

Q. Do you state that the lapses were less than those you found by the statistics?

A. No, sir; this is the idea. Say you've been in the employ of the company for one year, and have secured a premium list of $10,000, on which I am entitled to ten per cent. renewals; my annual renewal income is $1,000. This list is fetched to me for valuation, at the
156 expiration of the first year, before it can be known whether any of those policies will pay the second renewal. The entire eliminations have been made from the list, the per cent. of death. Now taking the statistics of companies with regard to such lists of policies upon this $10,000 premiums, I would be entitled to $761 on the first renewals, but if that list of policies, those that have actually lapsed or expired have already been eliminated, and that fact is stated to me, probably I would say that of this $10,000 I *I* would be able to collect $8,000, instead of $7,614, because the eliminations have already been made. So while in the first instance the amount of the renewal premiums is reduced, in the second instance the rate of lapses are reduced or diminished.

Mr. BARCLAY. Q. Applying that to your theory here, state what bearing that would have.

A. I could not positively state without having the figures.

Q. Suppose that in the list in which you made your valuation, as a matter of fact, half had lapsed prior to the time alleged of the breach, and yet you proceed to make your calculation on the basis that they were still in force. I want to ask you, suppose half had lapsed, what effect would that have on the estimated value?

A. That is really a rather difficult question to answer.

Q. Would it make any difference?

A. Yes, certainly; it will make a marked difference. It is always estimated by actuaries that in lists where there have been very heavy rates of reductions during the first two years of its existence, it will be a much lower rate thereafter. And the older the policies or more premiums that have been paid the more likely it will continue to pay.

J. R. BOOGHER, having been duly sworn, was examined on the part of the defendant, and testified as follows:

Q. State to the court, Mr. Boogher, the business you are engaged in.

A. I am in the dry-goods jobbing business.

157 Q. What is the name of your firm?

A. Well, the firm is Daniel W. Bell.

Q. How long has it been the firm of Daniel W. Bell?

A. Since January; prior to that it was Henry Bell & Son.

Q. Did you have any conversation with Odell and officers of the New York Life Insurance Company, at any time in regard to advances to be made to Davis R. Boogher?

A. I had several conversations with Mr. Odell when he was out here.

(Objected by counsel for pl't'ff. The court overruled the objection. Counsel for pl't'ff then and there duly excepted to the ruling of the court.)

WITNESS. And in conversation had with their agents, this matter was referred to.

Q. The question was whether you had a conversation with Mr. Odell?

A. Yes, sir; I had a conversation in which this account was spoken of.

Q. When was that?

A. I could not give the year; I had two conversations with him, perhaps more. I had a long conversation with him about my life insurance.

Q. When was that?

A. It was the first year, I think, that Mr. Davis R. Boogher was the agent of the company; I think it was in the latter part of the first year he was there. I could not tell; it has been so long ago.

Q. Was it in the early part of 1872?

A. Yes; it was about the time I took out my policy.

Q. State what occurred between you and Mr. Odell at that particular time, in regard to this conversation.

A. Well, we had a general conversation about Davis, here, about his using money, &c. He said to me that it was understood and known by the company, and that it was all right; they understood it, and they had no objection to it.

Q. Did he say that he had used any of the money?

A. He said that he had used some little of the money, and he had used with their knowledge and consent.

Q. Who spoke about it?

158 A. It came up in a general conversation along with Hill and my brother, and this thing was mentioned, and it was understood by the company that any moneys necessary to use along in his business

he would use, and it was done with their knowledge and consent, and a similar conversation to that I had with Mr. Wheaton, when he was out here a year or eighteen months ago. He said it was understood, and it was done with their knowledge and consent, that the sums of money he used from time to time, it was done with their knowledge and consent.

Q. How many conversations did you have with Mr. Wheaton on that subject?

A. We talked several times about it.

Q. At different visits?

A. When he was here; yes, sir. In fact, when he was here, I would see him two or three times. It was understood, Mr. Odell told me, and Mr. Wheaton told me, that the company had knowledge of it, and that it was done with knowledge and consent.

Q. What was said in the first conversation in regard to whether this retention of monies—whether that was to be done only at that time, or was it to be done later; what was said on that subject?

(Objected to by counsel for pl't'ff. The court sustained the objection. Counsel for def't then and there duly excepted to the ruling of the court.)

Q. Was there anything more said by Mr. Wheaton than what you have given us?

A. On that subject, as I said awhile ago, they said to me that they had knowledge of it, and it was done with their knowledge and consent, any monies he cared or wanted to use.

(Objected to by counsel for pl't'ff. The court sustained the objection. Counsel for def't then and there duly excepted to the ruling of the court.)

Q. Did you have any other conversation? I believe you had?

A. I had one conversation, that is the conversation I spoke of awhile ago, and in which he said it was done with their knowledge and consent.

159 (Objected to by counsel for pl't'ff.)

WITNESS. He said also at that time that he would endeavor——

(Objected to by counsel for pl'ff. The court sustained the objection.)

WITNESS. I will state a further conversation had with these two gentlemen, that the company had full knowledge and——

(Objected to by counsel for pl't'ff. The court sustained the objection.)

Q. State what time they said that; fix the time.

A. Mr. Wheaton was here about a year or eighteen months ago; I think, perhaps, last year in May; the conversation I had with him was down at the store; he came down there with Davis, and we sat down and had a general conversation, pleasantly, in which the general business of the company was talked of, &c., Davis being their agent, and in that conversation the matter of his salary and the monies he had used was talked of; and he said then that the company was aware of it and allowed him——

(Objected to by counsel for pl'ff.)

THE COURT. We don't want your inferences; state as near as you can what he said to you and give the dates.

A. He said in this conversation that the company allowed him to use the money, and it was done with their knowledge and consent, over and above his salary.

Q. Was there anything else said about that matter?

A. Those are the salient points, so far as I recollect.

Q. Did you talk often with Mr. Odell about the same subject?

A. I had two conversations with Mr. Odell; whether it was referred to in both conversations I could not say positive; it was in one, and one with Mr. Wheaton.

Q. The first conversation with Mr. Odell was far back in 1872?

A. It was in the early part of his connection with the company.

Q. And that with Mr. Wheaton was in the latter part?

A. I can't state the day of the year or month.

160 Cross-examined by Mr. JUDSON:

Q. Did you have more than one conversation with Mr. Odell?

A. Well, I know I had one, and I think I had two.

Q. The one you are certain of was in 1872?

A. It was in the early part of his connection with the company.

Q. The other conversation you are sure of was with Mr. Wheaton, you say?

A. Well, it was one of their agents; I think it was Mr. Wheaton; I did not ask his name.

Q. Do you remember the time any more exact than it was a year or eighteen months ago?

A. No, sir.

Q. Was there anything said in any of these conversations about any specific premiums that had been collected?

A. No, sir; I don't remember exactly whether any specific premium or amount was stated or not.

Q. You don't recollect that there was any reference to any specific policy?

A. I remember he had used some money more than his salary in connection with his business, and whatever monies he had used over and above his salary they said was done with the knowledge and consent of the company.

Q. You speak of a salary; you mean by that his regular commissions?

A. Yes; monies.

Q. You mean his compensation?

A. Yes; Whatever his compensation was; I don't remember what it was.

Evidence was closed & cause submitted.

AMOS M. THAYER, *Referee.*

Bill of exceptions cont'd.

And thereupon, on the 20th day of September, A. D. 1876, said referee filed his report as follows, to wit:

Referee's report.

Circuit court of the United States, eastern dist. of Mo.

NEW YORK LIFE INSURANCE CO., PLAINTIFF, } 771.
v.
DAVIS R. BOOGHER ET AL., DEFENDANT. }

161 To the honorable judges of the United States circuit court, eastern district of Mo.

By an order of court made on the 18th day of April, A. D. 1876, a copy whereof is hereto appended, the above cause was referred to me

for trial. In pursuance of said order, I qualified as referee, in the manner provided by law, by taking the annexed oath, and thereafter the parties, plaintiff and defendants, came before me at my office No. 12 North 4th street, in the city of St. Louis, Mo., on the 26th day of April, 1876, and on several days thereafter, to which adjournments were regularly made by consent of parties, and submitted their pleadings and proof. The cause was finally submitted to the referee for his decision on the 13th day of September, 1876, and I herewith submit my report upon the issues of law and fact therein involved.

The action is founded upon an indemnity bond executed by the defendants, Davis R. Boogher, as principal, and by his co-defendants as sureties, on December 22, 1871. The defendant Davis R. Boogher, having been appointed agent for the plaintiff, at the city of St. Louis, Missouri, for the purpose of soliciting applications for life insurance in plaintiff's company, and for the purpose of collecting and paying over the premiums thereon, executed an indemnity bond to secure the faithful discharge of his duties, and upon the condition accurately stated in the complaint, plaintiff now avers that the defendant Davis R. Boogher did not faithfully discharge the duties of his agency, in that he has failed to pay over to the plaintiff certain sums of money coming to his hands, amounting in the aggregate to the sum of fourteen hundred (1400) dollars. For this sum judgment is demanded against both the principal and sureties in the indemnity bond.

The defendants rely in the main upon the following defences to the action.

162 First. They deny that the principal in the bond is indebted to plaintiff by reason of the collection and retention of moneys belonging to the plaintiff. In other words, they contend that there has been no violation of the condition of the bond.

Secondly. They contend that defendants have been released from all liability on the bond by reason of a provision contained in a certain contract executed between Davis R. Boogher and the plaintiff, at a date subsequent to the making of the bond; and,

Thirdly. The defendants insist that the indebtedness now sought to be recovered from the defendants by a suit on the bond had been settled by an arrangement between Davis R. Boogher and the plaintiff, prior to the commencement of this suit.

In addition to the foregoing defences, the record also contains a counter-claim interposed by the separate answer of Davis R. Boogher, of the following substance and effect, to wit:

"The defendant Davis R. Boogher states that on December 23rd, 1873, he entered into a contract with the plaintiff for the purpose of working at the business of life insurance at the city of St. Louis, Mo., and soliciting policies in the plaintiff's company; that by said contract plaintiff agreed to allow defendant certain commissions on all premiums collected and received on policies of insurance effected through defendant, said commissions to continue for the term of 10 years from the date of the contract, unless defendant was suspended for good cause from the plaintiff's employ; that by said contract defendant was to have the right of collecting all the premiums on such policies of insurance as he effected, the same to be turned over to plaintiff after first deducting his commissions according to the rate fixed by the contract."

For a breach of this contract, defendant alleges, that on or about the month of June, 1875, he was discharged without cause from the

163 plaintiff's service; that he was denied the privilege of collecting premiums on policies of insurance effected through himself, where-

to as Exhibits A & C. The defendant, Davis R. Boogher, was first appointed agent of plaintiff under a contract or appointment dated November 1st, 1871. (See Exhibit A.)

On the 22nd of December, 1871, he and his sureties executed the indemnity bond now sued upon, to secure unto the plaintiff the faithful discharge of his duties as agent, both under the appointment of date November 1, 1871, or under any future appointment.

Defendant worked as the plaintiff's agent and solicitor under
167 his first appointment until December 23d, 1873, when a new contract was entered into, which has been above referred to as Exhibit C, and is the same contract on which the defendant's counter-claim is founded.

In many important respects, the appointments of date November 1st, 1871, and December 23rd, 1873, are different in terms, the principal difference being in the rate of commission allowed the defendant.

The appointment of date Dec. 23rd, 1873, under which the defendant worked from that time forward till his discharge on November 6th, 1875, contains the following clause, to wit: "This contract abrogates all former ones so far as new business is concerned;" and it is urged by defendant's counsel that this clause in the contract of December 23rd, 1873, operates to release the defendants from the obligations assumed by the bond of date December 22d, 1871, inasmuch as plaintiff only complains of acts committed by the defendant whilst acting under the second contract.

Your referee has been unable to coincide with, or assent to, this construction of the clause above quoted. In most perspicuous language, the bond sued upon was made to secure a faithful discharge of defendant's duty, "so long as the defendant continued to be agent for the plaintiff, whether under his existing appointment, or any future one," thereby plaintiff indicating a continuous liability whilst the relation of agent continued, even though defendants' rate of commission and mode of labor might be changed from time to time, as suited the convenience of the parties. For these reasons, I hold that the special plea of release from the obligation of the instrument sued upon, has not been maintained and ought not to prevail.

Recurring now to the first and main issue raised by the pleadings, it remains to be determined whether the principal in the bond sued upon, faithfully discharged his duties as agent, and paid over all the money belonging to plaintiff which came to his hands during the course of his agency.

168 The plaintiff alleges that defendant did not discharge his duty in this particular, and that a large balance still remains in defendant's hands belonging to the plaintiff.

Touching this issue I find that defendant, on various occasions, between December 22nd, 1871, and June 17th, 1875, collected or became chargeable with various sums of money on account of premiums due to the plaintiff, amounting in the aggregate to $3,468.70 dollars, which he did not at the time pay over to the plaintiff, and a portion of which sum he still owes to the plaintiff and has not accounted for. Of this sum defendant appears to have had the permission of the company to retain the sum of two hundred and fifty dollars, prior to appropriating the same to his own use, but in most instances the defendant seems to have retained his principal's money without any prior permission so to do. When the contract of date December 23rd, 1873, was entered into between plaintiff and defendant, the defendant was quite largely indebted to plaintiff by reason of the retention of premiums, and on that day defend-

ant authorized plaintiff to retain such renewal commissions as might thereafter accrue in defendant's favor for the purpose of cancelling his existing indebtedness. From that date forward until the termination of the defendant's agency, his renewal commissions were regularly applied to the payment of his indebtedness to the plaintiff, so that on November 6th, 1875, when defendant was finally discharged, his indebtedness had been largely reduced.

The plaintiff has produced and filed with the referee two accounts, marked respectively, Exhibits D & E, purporting to show the nature, amount, and items of defendant Davis R. Boogher's indebtedness to the plaintiff at the time of his discharge. Of these accounts, Exhibit D purports to show the various sums of money appropriated by the defendant out of plaintiff's funds in his hands, together with the payments thereon realized from defendant's renewal commissions, whilst
169 Exhibit E, purports to show the defendant's general dealings with the plaintiffs in the way of the receipt and payment of money during the of his employment.

I have examined these accounts in the light of the testimony produced before me, and report concerning them as follows:

These accounts were made up in the office of William L. Hill, who acted as general agent of the plaintiff at St. Louis, Missouri, during the period of defendant's agency.

The defendant, Davis R. Boogher, appears to have acted in a subordinate capacity under Mr. Hill during his agency, and most of his dealings with the plaintiff were transacted through Mr. Hill, as general agent. All monies coming to defendant's hands, which were turned over to the plaintiff, were, in the first instance, paid to the general agent at St. Louis, and by him were transmitted to the company. The defendant also, from time to time, obtained advances of money from the general agent out of the company's funds. Regular accounts of these transactions were kept by Mr. Hill as general agent at St. Louis, Missouri, upon the company's books in his office, and the accounts produced before the referee, marked Exhibits D & E, are correct transcripts therefrom.

The referee finds, from the testimony, that said accounts embody correct statements of defendant's indebtedness to plaintiff, for which Davis R. Boogher and his sureties are liable on the indemnity, with the following exceptions and corrections, to wit:

In the general account, Exhibit E, I disallow, as not sufficiently proven, the following items of the account, to wit:

Item of Aug. 30th, 1873	20 94
" " " " "	21 38
" " June 24th, 1874	20 60
" " February 13th, 1874	2 00
" " Aug. 31st, 1874	2 00
" " March 5th, 1875	9 00
Total	$75 32

170 I also disallow nine items of the general account, Exhibit E, amounting to forty-five ($45) dollars, which seem to have been penalties imposed on defendant in cases where policies were issued by the plaintiff at defendant's instance, and the assured parties afterwards declined to accept the policies and pay the first premiums thereon.

In my judgment the sureties on the bond are not liable for these pen-

alties, and I have according' stricken them from the debit side of the general account.

With these corrections the general account, Exhibit E, shows a balance in the defendant's favor of forty-six dollars and two cents.

The account marked Exhibit D has been kept in the following manner, to wit:

The defendant, D. R. Boogher, has been charged with various sums of money, collected and appropriated by himself in manner above stated, and he has been credited with such renewal commissions as he became entitled to from October 22, 1873, to November 6th, 1875. Simple interest has been computed on the various debit items, with periodical rests corresponding with the various payments on account, and the payments have been applied regularly to the liquidation of the oldest items on the debit side of the account.

This mode of computation I consider correct, so far as the first two items on the debit side of the account are concerned, inasmuch as the evidence shows a special agreement on defendant's part to pay interest on these sums. But with respect to the items charged to the defendant under the following dates—

December 16th, 1873	$1,028 28
December 18th, 1874	417 21
May 21st, 1875	180 78
June 1st, 1875	42 89
June 17th, 1875	554 11

The evidence shows no special agreement to pay interest there-
171 on, and I have accordingly disallowed the charges for interest on said sums prior to August 18th, 1875, when said sums were specially demanded of the defendant.

Making the foregoing corrections of account, marked Exhibit D, I find the balance due to plaintiff from Davis R. Boogher, on March 1st, 1876, the day this suit was commenced, to have been twelve hundred seventeen & $\frac{32}{100}$ dollars ($1,217.32), by reason of the transactions embraced in Exhibit D. Deducting from this sum the amount standing to defendant's credit on the general account, Exhibit E, shows a balance due to the plaintiff on March 1st, 1875, of eleven hundred and seventy-one & $\frac{30}{100}$ dollars ($1,171.30).

I accordingly report that judgment should be entered against the defendants for the penalty named in the bond, the same to be discharged on the payment of the sum of eleven hundred seventy-one & $\frac{30}{100}$ dollars ($1,171.30) and interest from March 1st, 1876, and costs.

I would further report that all the testimony, and written and printed exhibits produced before the referee are herewith returned into court.

All of which is respectfully submitted.

AMOS. M. THAYER,
Referee.

Bill of exceptions cont'd.

And thereafter, on the 25th day of September, A. D. 1876, defendants filed their exceptions to said report as follows, to wit:

Exceptions to referee's report.

In the circuit court of the United States for the eastern district of Missouri.

NEW YORK LIFE INSURANCE CO., PLAINTIFF,
vs.
DAVIS R. BOOGHER ET AL., DEFENDANTS.

Now come defendants in this cause and object to the confirmation of the report of the referee herein, and say that said report should not be confirmed, and except to said report; and for their particular exceptions thereto, they assign the following, to wit:

172 1. The said report is contrary to law.

2. Said report is contrary to the weight of the evidence.

3. Said report is not sustained by the evidence in said cause.

4. The conclusions of said referee in said report are not sustained by his findings of fact therein.

5. Said report is erroneous, and not in accordance with law.

6. The findings of fact stated by the referee in said cause are not sustained by the evidence, and are contrary to the evidence.

7. The referee erred in finding in said report that D. R. Boogher, defendant, was discharged by plaintiff for good cause.

8. The referee erred in holding that the special plea of release in the answers herein had not been sustained.

9. The referee erred in finding that defendant D. R. Boogher retained the funds of plaintiff without authority from plaintiff.

10. The referee erred in finding in favor of plaintiff on the counter-claim of defendant D. R. Boogher.

11. The referee erred in finding that the plaintiff & defendant had not settled and adjusted their dispute in regard to the matters in suit prior to the commencement of this suit.

12. The referee erred in finding that def't D. R. Boogher had not accounted for all funds by him collected for the plaintiff.

13. The referee erred in finding that said D. R. Boogher retained funds of plaintiff without any prior permission so to do.

14. Upon the evidence in this cause, the referee should have found in favor of def't D. R. Boogher on the counter-claim in this cause.

15. The referee erred in admitting the accounts mentioned in the report as evidence against defendants.

16. The referee erred in admitting incompetent & irrelevant testimony in favor of plaintiff.

17. The said findings above mentioned as erroneous are not supported by the evidence in the cause, or by any evidence therein.

18. Said findings are contrary to the evidence in said cause.

19. The referee erred in admitting in evidence a note for $1,000,

173 dated October 8th, 1873.

20. The referee erred in finding a balance due plaintiff on the accounts admitted by referee in evidence.

21. The referee should have found for the defendants on the main issues of said cause.

22. The referee should have found for defendant D. R. Boogher on the counter-claim set up in the answer.

Wherefore said report of said referee should not be confirmed, but said exceptions above assigned should be sustained.

By MARSHALL & BARCLAY,
For Def'ts.

And thereafter, on the hearing of said exceptions to said report, the evidence above mentioned was read to the court by counsel, together with said report, and said exceptions were then, after argument, submitted to the court, and thereafter, on the 28th day of October, A. D. 1876, said exceptions were overruled by the court, to which ruling, each and all of said defendants then and there duly excepted; and thereafter judgment was rendered on said report by the court, to which action said defendants excepted at the time; and thereafter, on the 2d day of November, A. D. 1876, said defendants filed herein their motion for a new trial, in these words, to wit:

Motion for new trial.

In the circuit court of the United States for the eastern district of Missouri.

NEW YORK LIFE INSURANCE COMPANY, PL'FF,
vs.
DAVIS R. BOOGHER ET AL., DEF'TS.

Now come defendants herein and move this court to grant them a new trial of this cause, for the following reasons, to wit:

1. The court erred in overruling the exceptions of defendants to the report of the referee herein.
2. The verdict is contrary to the law and the evidence.
3. The court should have rendered judgment for defendants upon the facts found in the report of the referee.
4. Defendants have since trial discovered new & material
174 evidence, which they believe will sustain their defense herein to the satisfaction of the court.
5. The referee's report herein is contrary to the evidence.
6. The verdict is contrary to the weight of the evidence.
7. The referee erred in finding for the plaintiff upon the counterclaim of Davis R. Boogher.
8. The verdict is for an excessive amount.
9. The referee erred in admitting in evidence the note for $1,000 made by defendant D. R. Boogher.
10. The verdict should be for the defendant upon the facts admitted by the plaintiff's own witnesses.
11. The findings of fact by the referee are wholly insufficient to warrant any verdict for plaintiff.
12. The referee erred in admitting in evidence the accounts filed as exhibits with the petition herein.

MARSHALL & BARCLAY,
For Defendants.

Which said motion was afterwards, on the 11th day of November, A. D. 1876, overruled by the court, to which ruling and order each and all of said defendants then and there duly excepted; and thereafter, on the 11th day of November, A. D. 1876, the defendants by leave of court filed their motion to re-refer said cause in these words, to wit:

Motion to re refer.

In the circuit court of the United States for the eastern district of Missouri.

NEW YORK LIFE INSURANCE COMPANY
v.
DAVIS R. BOOGHER ET AL.

Now come defendants & move the court to reopen the cause, and send this cause again to the referee herein for further hearing, because defendants have discovered new and material evidence herein, favorable to their defense herein, which they desire to submit to the consideration of said referee & this court.

MARSHALL & BARCLAY.

175 And thereafter in support *in support* of said motion were filed for defendants the following affidavits, to wit:

In U. S. circuit court for eastern district of Missouri.

N. Y. LIFE INS. CO.
vs.
BOOGHER ET AL.

DAVIS R. BOOGHER, of lawful age, being duly sworn, on his oath says that he is defendant in this cause above entitled: that he knows R. H. Fant; that said Fant and affiant had a conversation in regard to the matters in issue in this case some time before it came on to a trial; that said Fant told affiant in said conversation that he was book-keeper and cashier of the pl't'f (the said insurance co.), at this city of St. Louis, during 3 years of the agency of def't Boogher for plaintiff from the time said Boogher's agency began; that said Fant, at said conversation, told affiant that he would testify that, according to the general course of dealing between affiant and said company, money was often advanced to said affiant, and he (affiant) was frequently expressly permitted and authorized by Mr. Hill, general agent of plaintiff, to use money received as premiums for his own use & benefit; that said Fant, at said conversation, further said that he would testify that the contract of plaintiff with affiant had been broken by plaintiff; that this affiant did not succeed in finding said Fant at any time during the time of this trial, nor until after the report of the referee herein; that within the past few weeks he accident'ly discovered that said Fant had returned to St. Louis, and was at a farm in the county of St. Louis; that affiant could not. & did not learn of said whereabouts of said Fant before the filing of report of said referee herein; that affiant believes said Fant will testify as above stated upon a further hearing herein before said referee, and will testify to still further facts favorable to this affiant, but not
176 yet fully known to affiant; that said Fant has not come to the city of St. Louis from the country, so that affiant could file said Fant's own affidavit since this motion was made, but affiant daily expects him to come, and will his affidavit herein, by the court's leave, on his arrival; that affiant files also herewith the affidavit of one Taylor, who was not examined at said hearing, and prays the court to the referee for the hearing of the testimony of said Fant & said Taylor, & such further proceedings thereon as may be just in view of said new testimony.

DAVIS R. BOOGHER.

Subscribed and sworn to before me this 21st day of November, A. D. 1876.

[SEAL.] PH. VERNET TAYLOR,
Notary Public, St. Louis County, Missouri.

I was qualified Dec. 20th, 1875, and my term expires Nov. 24th, 1881.

In United States circuit court, eastern district of Missouri.

NEW YORK LIFE INS. CO.
vs.
DAVIS R. BOOGHER ET AL.

MORTIMER F. TAYLOR, of lawful age, being duly sworn, deposes and says that in the summer of 1875, some time in June, if my memory serves me correctly, Davis R. Boogher consulted me professionally with reference to his status with the New York Life Insurance Co., for which company he was then working as general agent for the county of St. Louis. After examination of his contracts with that said company, and giving audience to his statements concerning his dealings with the company, I advised him that, by reason of the failure on the part of the company to deliver certain policies to persons insured by said Boogher, and in other ways hindering and delaying his business, without warrant under the contract for so doing, it (the said company) had committed a technical breach of its contract with him (Boogher), but advised him to make an amicable settlement of the matter with his company, and, if possible, sell out his interest under the contract to
177 the company. At my dictation he addressed several letters to the company on this subject, which were followed by the appearance in St. Louis of one Wheaton, who represented himself as the agent of the company, sent on by it to adjust its differences with Boogher. Wheaton was brought into consultation with me, and I mentioned to him the conclusions I had reached in regard to Boogher's standing with the company.

Affiant further says that just before Wheaton arrived in St. Louis Boogher again consulted him upon some differences between him and one Hill, the general agent of the company at this place, representing to affiant that certain policy-holders insured in said company by him as agent, and to all profits arising under the payments on their policies to the company, affiant advised said Boogher he was entitled, under his contract, had made some important changes in the nature and terms of their insurance, by reason of which large profits accrued to the company; and to a commission upon which said Boogher was advised by affiant he was entitled, but which had been appropriated by said Hill, who refused to allow said Boogher credit for same on his settlement with him, said Hill. Upon my advice Boogher wrote a formal protest to Hill against his appropriation of the proceeds of the changes above mentioned, stating that he held considerable monies in his hands as agent, all of which he was prepared to turn over to him in monthly settlement provided the commissions due him as aforesaid should be entered up to his (Boogher's) credit; otherwise he should retain what monies he had in his hands, and insist upon his right to the same as an offset. All of which correspondence and actions we laid before the said Wheaton, the agent of the company as aforesaid, and the course of Boogher in the premises fully explained during the consultations
178 between them, Wheaton and Boogher, with affiant, looking to the settlement of said Boogher's differences with the company,

and in which position, it was my understanding at the time, said Wheaton fully concurred. It being my imperative demand, as attorney for Boogher, that these commissions, appropriated by Hill as aforesaid, should be entered to his credit before he would make his regular settlement, and balance his (Boogher's) account, and to do which he, the said Boogher, then expressed his full preparation and willingness. And further deponent saith not.

M. F. TAYLOR.

Sworn to and subscribed before me this 21st Nov., 1876.
[SEAL.] PH. VERNET TAYLOR,
Notary Public St. Louis County, Missouri.
I was qualified Dec. 20, 1875, and my term expires Nov. 24th, 1881.

In the U. S. circuit court for the eastern district of Missouri.

NEW YORK LIFE INSURANCE COMPANY, PL'FF,
vs.
DAVIS R. BOOGHER ET AL., DEF'TS.

RICHARD H. FANT, of lawful age, being duly sworn, on his oath says he resides in the county of St. Louis, and is acquainted with Davis R. Boogher, defendant, and William L. Hill, agent of plaintiff at St. Louis; that during the period of said Boogher's agency for pl'ff, under said Hill, he (said Fant) was in employ of plaintiff at its office in St. Louis, and likewise under said Hill as general agent; that affiant was book-keeper for said Hill as such agent during said agency of Boogher aforesaid; that repeatedly during the years, 1871, 1872, 1873, and 1874, affiant has heard said Boogher come to said Hill, and say he (B.) had collected a certain premium or renewal, and asked that he (said Boogher) might retain the same, needing it for his own use, and said Hill replied to such request by saying that he might so retain said premium, or that it was all right, or words to that effect, and then said Hill would
179 at once tell affiant to charge said premium against Boogher, which affiant accordingly did; that this happened repeatedly during the years above named; and moreover, besides the said advances in the form aforesaid, said Hill further often handed said Boogher cash or checks as advances on his account; that during the past summer affiant was not in the city of St. Louis, but was out on the Clayton road, about 11 miles, working on a farm for Samuel Van Skike; that he has no interest, directly or indirectly, in the result of this suit. And further saith not.

R. H. FANT.

Subscribed and sworn to before me this 23d day of November, 1876.
[SEAL.] WM. C. MARSHALL,
Notary Public, St. Louis Co., Mo.

Qualified May 3d, 1876. Commission expires April 11, 1882.

And in opposition to said motion were filed for the plaintiff the following, to wit:

In the circuit court of the United States for the eastern district of Missouri, ss:

RICHARD H. FANT, being duly sworn, upon his oath deposes and says, that from the beginning of the present year until the 7th of August last past, he resided at No. 1001 Pine street, in the city of St. Louis, and that during said stay in the city of St. Louis he occasionally met and conversed with defendant, Davis R. Boogher;

that during all of said period affiant's business was in the city of St. Louis, and he was daily subject to any process of subpœna from courts sitting in the city of St. Louis, including this honorable court; that on the 7th day of August, 1876, affiant moved temporarily to a farm situated about eleven miles from the city of St. Louis, on the Clayton road, and since said date has been engaged in laboring on said farm and in that immediate vicinity, excepting occasional visits to the city of
180 St. Louis, and that on the 17th day of November he returned to his aforesaid residence in the city. Affiant further states that he was never summoned as a witness in this cause during his residence in the city, and that he was during that whole period, and since, ready to obey promptly any such summons. And further affiant says not.

RICHARD H. FANT.

Sworn and subscribed to before me this 4th day of December, 1876. Witness my hand and official seal.

F. N. JUDSON,
Notary Public, St. Louis County.

Qualified Jan. 17, 1873. Com. expires Jan. 4, 1877.

Which said motion was thereafter on the 8th day of January, 1877, submitted to the court upon said affidavits, and was by the court on the 9th day of January, 1877, overruled by said court, to which ruling each and all of said defendants excepted at the time; and said defendants now present this bill of exceptions in the premises to the end that said proceedings be made part of the record herein, and pray that the same be signed, sealed, and made of the record herein, which is done accordingly, this 12th day of January, A. D. 1877.

SAMUEL TREAT, [SEAL.]
Judge.

And afterwards, at an adjourned day of the September term of said court, the following further proceedings were had in said cause, on the 17th day of January, 1877, to wit:

NEW YORK LIFE INSURANCE CO., PLAINTIFF,
vs.
DAVIS R. BOOHER ET AL, DEFENDANT.

Now come the defendants by their attorneys, and present to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation, citing and admonishing the said plaintiff to be and appear at a Supreme Court of the United States, at
181 the next term thereof, on the second Monday of October next, which said writ of error is allowed, and said citation signed by the judge; and the defendants also present to the court their bond in the penal sum of three thousand dollars, which bond is approved; and on motion of defendants it is ordered that a supersedeas be awarded staying further proceedings on the judgment herein.

And the said bond so approved as aforesaid is in words and figures following, to wit:

Bond.

Know all men by these presents, that we, Davis R. Boogher, Jesse L. Boogher, Rufus Randall, and John B. Nowland, John P. Boogher and J. C. Wilkinson are held and firmly bound unto New York Life Insur-

ance Company, in the full and just sum of three thousand dollars, to be paid to the said New York Life Insurance Company or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this seventeenth day of January, in the year of our Lord one thousand eight hundred and seventy-seven.

Whereas lately, at the September term, 1876, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between New York Life Insurance Company, plaintiff, and Davis R. Boogher, Jesse L. Boogher, Rufus Randall and John P. Newland, defendants, judgment was rendered against the said Davis R. Boogher, Jesse L. Boogher, Rufus Randall and John P. Newland for eleven hundred and seventy-one $\frac{30}{100}$ dollars; and the said Davis R. Boogher, Jesse L. Boogher, Rufus Randall and John P. Newland having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said New York Life Insurance Company, citing and admonishing it to be and appear at a

182 Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said Davis R. Boogher, Jesse L. Boogher, Rufus Randall and John P. Newland shall prosecute said writ to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

DAVIS R. BOOGHER, [SEAL.]
JESSE L. BOOGHER. [SEAL.]
RUFUS RANDALL. [SEAL.]
JOHN B. NOLAND. [SEAL.]
JNO. P. BOOGHER. [SEAL.]
J. C. WILKINSON. [SEAL.]

Approved by—

SAMUEL TREAT, *Judge.*

183 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be true copies of the record and proceedings in case No. 771 of the New York Life Insurance Company, plaintiff, against Davis R. Boogher et al., defendants, as fully as the same remain on file and of record in said case, in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this 28th day of February, in the year of our Lord eighteen hundred and seventy-seven.

M. M. PRICE,
Clerk of said Court,
By A. P. SELBY,
Deputy.

(Indorsement on cover:) No. 307. Davis R. Boogher, Jesse L. Boogher, Rufus Randall, and John B. Nowlan, plaintiffs in error, vs. The New York Life Insurance Company. E. Missouri C. C. U. S. Filed 15th October, 1877.

REC. 307—7

FILED
OCT 26 1880
JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

Error to Circuit Court of Eastern District of Missouri.

DAVIS R. BOOGHER, ET AL.,
Plaintiffs in Error,
vs.
NEW YORK LIFE INSURANCE COMPANY,
Defendant in Error.

STATEMENT FOR PLAINTIFFS IN ERROR.

MARSHALL & BARCLAY,
with whom is
LINDEN KENT, ESQ.,
Counsel for plaintiffs in error.

St. Louis: Press of G. I. Jones & Co.

IN THE

SUPREME COURT

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UNITED STATES.

Error to Circuit Court of Eastern District of Missouri.

DAVIS R. BOOGHER, ET AL.,
Plaintiffs in Error,
vs.
NEW YORK LIFE INSURANCE COMPANY,
Defendant in Error.

STATEMENT FOR PLAINTIFFS IN ERROR.

This action was begun by defendant in error, to recover for alleged breach of an indemnity bond, executed by plaintiffs in error, to secure the faithful performance by Davis R. Boogher of his duties as agent of defendant in error.

THE PETITION

of defendant in error (Printed Record, p. 2) sets forth the agency of Davis R. Boogher, states the effect of his bond of indemnity and its execution December 22, 1871, and that he had not paid over to defendant in error all moneys belonging to it which had been received by him *as said agent*. The petition makes no claim on account of any demand against Boogher, except "*as agent*" for defendant in error.

THE ANSWERS

of plaintiffs in error were separate. The answer of the agent, D. R. Boogher, denied the facts in the petition touching liability, and then made a special plea (Record, p. 25) as follows: —

"And for further answer this defendant says, that by the sealed contract of appointment between plaintiff and this defendant, executed on the twenty-third day of December, 1873 (and referred to in the petition herein as Exhibit C), it was expressly agreed between said parties, that said last-named contract abrogated all former contracts between said parties, so far as new business was concerned; that is to say, so far as business thereafter done by this defendant as agent for plaintiff was concerned; and this defendant says that said stipulation in said last-named contract was part of the consideration to him moving in accepting and executing said contract on his part; and he further says, that all the matters and things complained of by plaintiff herein, concern said new business; that is to say, business done by this defendant as agent for plaintiff since the date of said last-named contract, to wit, December 23, 1873. And defendant says that by reason of said premises he has been by plaintiff released from said obligation sued on herein. Wherefore, he prays judgment accordingly," etc.

The answer of Davis R. Boogher then proceeded to set up a

COUNTER CLAIM

for $6,000, by reason of facts particularly set forth (at page 26 of the Record), the substance of which is as follows: That by the contract of employment between these parties, this plaintiff in error was entitled to certain commissions on all premiums on policies effected through this plaintiff in error; that said commissions were to continue during ten years; that this plaintiff in error was to have the right of collecting said premiums during that term, unless discharged for cause; that in June 1875, the defendant in error refused to permit him to collect such premiums, and refused to perfrom the said contract on its part; and that plaintiff in error has been always ready and willing, etc., and has sustained $6,000 damages by reason of this breach of contract.

The separate answer of the securities is to the same effect as that of their principal, except in the matter of his counter-claim (Record, p. 26), which they omit.

REPLIES

were made by defendant in error to these answers (Record, pp. 27 and 28), but the *facts* stated in the foregoing "special plea" were not denied: and thus the issues in the cause (according to the practice in Missouri) were joined.

The cause was then sent for trial to a

REFEREE,

to hear and report upon the whole case. (Record p. 29.)

The evidence and proceedings before the referee are preserved by bill of exceptions (Record, p. 29), as is also his report thereon. (Record, p. 84.)

We desire especially to call the attention of this court to

the following facts, established before the referee by the testimony adduced on the part of the defendant in error itself, and respecting which there is no dispute.

UNDISPUTED FACTS IN EVIDENCE.

The general agent at St. Louis for defendant in error (Mr. HILL) testified that after the first contract of agency (Exhibit A, Record, p. 4) was made, October 27th, 1871, between his company and D. R. Boogher, the company loaned the latter $1,000 on the 8th of October, 1873, and took his note for that sum, payable at one year after that date, with interest at the rate of 10 per cent per annum from date, "*to pay his indebtedness to the company*" (Record, p. 31); "he gave the note to the company, and he drew draft on the company for $1,000, and turned the money over to me, and I sent the money forward to the company in one of my general settlements" (Record, p. 33); that December 16th, 1873, an item of $1,028.24 "for money due the company" was arranged between D. R. Boogher and the company in New York, so that he was charged with it (Record, p. 31) on the books of the company as *cash advanced*, viz:

"December 16, 1873, to cash, $1,028.24." (See Record, line 3, page 15.)

That *after both of these transactions*, which (according to the company's own showing) left the plaintiff in error, D. R. Boogher, indebted to the defendant in error at least $2,028.24 for money loaned on note and without note, the company re-engaged him as agent, December 23d, 1873, upon the contract mentioned as Exhibit C in the petition (Record, p. 8). One of the terms of this last agreement was this:

"15th. *This contract abrogates all former ones, so far as new business is concerned.*"

On *cross-examination*, the same witness for defendant in error (its general agent, under whom D. R. Boogher was

employed) admitted the following facts: — "Defendant would *borrow money* and a ticket would be put in the cash drawer; and at the end of the month, if the defendant failed to pay, the money would be charged up on the books." (Record, p. 33, beginning on last line of that page.) * * *

"All the money LOANED *to the defendant* was loaned by my orders and charged to him under my supervision. This relates to all the items of money loaned to defendant in the account." (Record, page 34, beginning at fifth line from top).

The items of money thus loaned to D. R. Boogher, *prior to the making of the second contract of employment*, are found in the exhibits to the petition of defendant in error, testified by Mr. Hill to be "correct transcripts from my books." (Record, p. 30). These items of money thus loaned in cash, *prior to the second contract of emplyment*, are the following: —

			Printed Record.	
			Page.	Line.
1872.				
March 30.	To cash borrowed	$50 00	18	28
	To cash	29 30	18	29
1873.				
April 11.	"	5 00	18	30
" 12.	"	15 00	18	40
" 15.	"	10 00	18	41
" "	" borrowed money payable on demand	1 50	18	42
" "	" borrowed money payable on demand	100 00	18	43
" "	" borrowed money payable on demand	162 10	18	44
June 28.	"	22 00	18	58
Oct. 21.	To cash	62 00	19	26
" "	" loan'd	34 75	19	27
	"	50 00	19	28

The total of these items is $541.65, of which $348.35 are items which (even in this memorandum account) are expressly entered as "*cash borrowed or loaned.*"

The grand total of items of money loaned by the company to D.R. Boogher before the second contract of employment, December, 23, 1873, was as follows: —

1. Note of October 8, 1873	$1,000 00
2. Item "To cash," December 16, 1873	1.028 24
3. Aggregate of small loans to October 21, 1873	541 65
Total	$2.569 89

The second contract of agency (Exhibit C to petition, (Record, p. 8), made December 23, 1873, devolved on D. R. Boogher the right and duty of collecting the premiums on policies effected through him.

After the making of this second contract, there were, continually, loans of cash made to Boogher by the company (Record, p. 34), the items of which, taken literally from the exhibits of defendant in error, are these, viz: —

			Printed Record. Page.	Line.
1873.				
Dec. 29.	To cash	$112 10	19	50
1874.				
Jan. 12.	To cash	20 00	19	64
Feb. 13	"	2 00	19	65
" 14	"	60 00	19	66
Mch. 7	"	200 00	19	68
" 14	"	5 00	19	69
Apl. 6	"	10 00	20	2
" 8	"	12 00	20	3
May 13	"	16 00	20	11
June 1	"	5 00	20	15
" 10	"	5 00	20	18
" 16	"	5 00	20	23
July 1	"	10 00	20	26
" 18	"	5 00	20	31
" 20	" (Hill's check)	70 00	20	32
Aug. 31	"	2 00	20	39
Sept. 10	"	10 00	20	45
" 26	"	10 00	20	49
Oct. 6	"	2 00	20	52
" 8	"	100 00	20	53
1875.				
Jan. 25	"	8 00	20	61
Feb. 19	"	2 00	20	70
Mch. 31	"	30 00	20	79
" "	"	2 00	20	80
" "	"	5 00	20	81
April 30	"	5 00	20	83
Total of these items		$713 10		
Add loans made prior to Dec. 23, 1873, as above		$2.569 89		
Total cash loans to D. R. Boogher by Company		$3,282 99		

The accounts of defendant in error show that at the time the present suit was brought, its entire alleged claim against D. R. Boogher was only $1,400.78, which sum is *less* (by over $1,000) than the sum it had loaned Boogher prior to making its second agreement of agency with him. The sum claimed in the petition is only $1,400.78 (Record, p. 3), and the sum found due by the referee only $1,171.30. (Record, p. 90.)

In August, 1875, written demand was made for the payment of all moneys due to the company by Boogher, "AS AGENT" (Record, p. 33); but the company had already refused to allow him to collect premiums according to its contract. Mr. Hill's evidence on this point is as follows:—

"In summer of 1875, after the last defalcation, I refused to give defendant any policies to collect first premiums thereon. Think this refusal was in May or June, 1875. This refusal applies to policies solicited by defendant. Mean by '*defalcations*' THAT DEFENDANT COLLECTED MONEY AND RETAINED IT. Last defalcation was June 14, 1875." (Record, p. 35.) And further on: "Our refusal to let him collect money was about May or June, 1875. That refusal was not withdrawn." (Record, p. 37.)

It appeared also from Mr. Hill's evidence that Boogher's commissions on renewals amounted to at least one thousand dollars per year, "but can't say if they amounted to $1500." (Record, p. 35.)

November 6th, 1875, the company discharged Boogher (Record, p. 33), and this suit was brought March 1st, 1876 (Record p. 2). Between the making of the second contract of agency (December 23d, 1873) and the time of his discharge (November 6th, 1875), Boogher had reduced the debt from $2,569.89 of cash loans to him by the company) to $1,400.98, the total sum claimed in the petition (Record, p. 3.) This was done by the earnings and commissions secured by Boogher's industry, and set forth, in detail, in the exhibits to the petition filed by defendant in error. (Record, pp. 12 to 24.)

THE FINDINGS OF THE REFEREE

are set forth in full (at page 84) in the printed Record, and we call attention to the following, among the other findings made by him:

I.

That prior to June 14th, 1875, defendant collected and retained $554.11, in addition to $417.21 prior to December 7th, 1874, making a total of $971.32 prior to June 14th, 1875 (Record, p. 86); and that "the unauthorized retention of plaintiff's funds between December 23d, 1873, and June 14th, 1875, warranted plaintiff in terminating the contract and declaring a forfeiture of defendant's commissions; wherefore, on the matter of the counter-claim I find in plaintiff's favor and against the defendant, Davis R. Boogher." (Record, p. 87.)

II.

That in the present case the defendant in error "only complains of acts committed by defendant" (*i. e.* D. B. Boogher), "whilst acting under the second contract."

III.

That the amount due by Boogher, March 1, 1876 (the date suit was begun), on account of the matters complained of in the petition, is the sum of $1,171.30.

THE CONCLUSIONS OF LAW,

drawn by the referee from the testimony and his findings of fact, were that there should be judgment for defend-

ant in error, for the sum of $1,171.30 with interest from beginning of the suit, March 1, 1876.

EXCEPTIONS

to the report were duly filed. (Record, p. 91.) They particularly and minutely object to all the matters which are made the subject of discussion or comment in our brief herein, of which we need mention here only the following: —

"3. Said report is not sustained by the evidence in said cause."

"7. The referee erred in finding in said report that D. R. Boogher, defendant, was discharged by plaintiff for good cause."

"9. The referee erred in finding that defendant, D. R. Boogher, retained the funds of plaintiff without authority from plaintiff."

"10. The referee erred in finding in favor of plaintiff on the counter-claim of defendant, D. R. Boogher."

"14. Upon the evidence in this cause, the referee should have found in favor of defendant, D. R. Boogher, on the counter-claim in this cause."

"17. The said findings, above mentioned as erroneous, are not supported by the evidence in the cause, or by any evidence therein."

"19. The referee erred in admitting, in evidence, a note for $1,000, dated October 8, 1873.

"22. The referee should have found for defendant, D. R. Boogher, on the counter-claim set up in the answer.

The court below, thereupon, overruled the exceptions to the report. (Record, p. 92.) Exception was preserved to said ruling, and the court then rendered judgment for $1,217.52. (Record, p. 29.)

A MOTION FOR NEW TRIAL

was made by plaintiffs in error (Record, p. 92), and in due course overruled, and exception saved; upon which, plaintiffs in error filed their full bill of exceptions, preserving all the matters above mentioned, and sued out the present writ of error. Service of citation was duly waived (Record, p. 2), and the cause now stands here for review.

ASSIGNMENT OF ERRORS.

I. The referee erred in finding in favor of defendant in error on the counter-claim of D. R. Boogher, and the court erred in confirming that finding.

II. The undisputed facts in the case, established by the testimony of defendant in error, fail to support the finding of the referee that D. R. Boogher was discharged for good cause, because of an "unauthorized retention of plaintiff's funds," (Record, p. 87) and the court erred in confirming that finding.

III. The pleadings of defendant in error in the case are not supported by any evidence.

IV. The special plea of discharge made by plaintiffs in error was fully sustained, as appears by the pleadings and the findings of the referee, and the court erred in not rendering judgment for plaintiffs in error thereon.

BRIEF FOR PLAINTIFFS IN ERROR.

I.

Concerning the jurisdiction of this court.

The answer of plaintiff in error, D. R. Boogher, sets up a counter-claim for $6,000 for breach of contract, on facts therein set forth. On this issue the referee found against D. R. Boogher. This clearly gives this court jurisdiction of the cause for review, by reason of the amount ($6,000) thus involved.

Ryan *v.* Bindley, 1 Wall. 66;
Ready *v.* New Orleans, 27 La. Ann. 169;
Wag. (Mo.) Stats., Vol. II. p. 1051, § 2.

II.

The referee erred in finding in favor of defendant in error on the counter-claim of D. R. Boogher, because such finding is not supported by any evidence.

Although this court will not review disputed facts, or determine the weight of evidence, any more than the Supreme Court of Missouri, yet where a finding or judgment is not supported by *any evidence*, or is contrary to all the evidence, reversal will follow. This condition of the case exists here.

Heckers *v.* Fowler, 2 Wall. 129;
Fury *v.* Merriman, 45 Mo. 500.

a. In May or June, 1875, according to the evidence adduced by defendant in error, it refused to allow D. R.

Boogher to collect renewal premiums on insurances effected by him (Record, p. 37), and then, on August 18, 1875, notified him, in writing, to pay all money due by him, "*as agent*," with the statement, that "in case of a failure on your part to comply with this demand, the said agreements" (namely, of agency and commissions) "will be annulled *for cause*." (Record, p. 33.)

After this, on November 6, 1875, D. R. Boogher was accordingly discharged "*for cause*," as had been threatened. (Record, p. 33.) Prior to this discharge, however, and *after every fact of which defendant in error complains in this case as breach of duty, had occurred*, the company notified his securities that it intended "to continue said D. R. Boogher in our employ," "*unless you notify us immediately of your* OBJECTIONS thereto." (Record, p. 44.)

Did the securities object? This is the testimony of Mr. Hill, agent of the company, as to that: "Nowland said he did not care anything about the matter, as he was indemnified. J. L. Boogher said he would let me know about it. *I had no further response from the sureties.* Boogher and plaintiff *were agreed* as to terms on September 6, 1875, and *Boogher could then have gone on, if his sureties had assented.* The terms of the agreement were that defendant was to have an advance of $150 per month, to be charged up against him. *His commissions were to remain the same.* This letter (*i. e.* of September 6, 1875, Record, p. 44) was delivered to all the sureties. *None of the sureties notified me that they would assent to it.*" (Record, p. 45.)

As none of the sureties notified that *they objected*, their assent was inferred by their failure to object.

Wiggins *v.* Burkham, 10 Wall. 129.

Hence, these facts constituted, as between D. R. Boogher and the company, a waiver of any former breach of duty on his part, and hence his discharge, November 6th, 1875, *without any new cause therefor* (and the referee makes no

finding of any such new cause, but places the discharge on retention of money prior to June 14th, 1875, Record, p. 86), was without foundation and did not operate to forfeit his commissions for business already secured by him for the company.

Swain v. *Seamens*, 9 Wall, 254;
Clark v. *U. S.* 6 Wall, 543;
McNaughter v. *Cassally*, 4 McLean, 530;
Marshall v. *Williams*, 2 Biss. 255.

The total value of those commissions in September, 1875, according to the only accurate evidence in the case on the subject (Record, p. 80), was $5,317.65; and Mr. Hill, the witness of defendant in error, admits these commissions on renewals were worth more than $1,000 per year. (Record, p. 35). The contracts had at least six years to run. (See contracts, Record, pp. 4 and 8). Hence, as D. R. Boogher was discharged without valid and *then existing* cause, his interest in the renewal commissions of policies secured by him, was not destroyed, according to the very terms of the contracts. (Section 14, Record, p. 11).

Subsequent approval of the acts of an agent is equivalent to prior authority; and an act cannot be approved *in part;* it must be ratified *as done*, if at all.

Menkens v. *Watson*, 27 Mo. 163:
Wharton on Agency, § 972.

b. The evidence of defendant in error, taken from its own books (see *ante*, pages 5 and 6), shows that prior to the making of the second contract of employment with D. R. Boogher, December 23d, 1873, the company had actually loaned him, in cash, a sum ($2,519.89) far in excess of the amount claimed in the petition in this case, $1,400.98, to say nothing of similar cash loans of $713.10, made there-

after. Surely the making of a new contract of employment was a waiver of any cause for discharge under the prior contract. There can be no doubt that D. R. Boogher had the right, on receiving money, if he saw fit, to apply it to payment of what was justly due him for commissions on renewals of policies he had secured for the company, and he did so apply it.

Alexandria v. *Patten*, 4 Cranch, 317;
Waterman v. *Young*, 49 Mo. 413;
Jackson v. *Burke*, 1 Dillon, 311.

The evidence shows that he did not even do that, except in part, for between December 23d, 1873 and the time suit was brought, he reduced the amount due by him (on account of cash loans) from $2,569.89 to $1,400.98.

The whole evidence shows that the company voluntarily loaned D. R. Boogher, in cash, a sum far greater than the amount claimed by it in this action. The principal and interest due at the time of trial on the $1,000 note alone (Record, p. 31), which the company had taken for money loaned him, was greater than the sum found due by the referee ($1,171.30)!

The company certainly had no right to discharge Boogher for failure to repay, on demand, the cash loaned him. He had repaid, by commissions and other business, a great part, and his liability for such loans was not a liability "as agent," but as an individual.

U. S. v. *Stafford*, 2 Paine C. C. 525.

c. If these inferences from the undisputed facts are just, the finding against D. R. Boogher on the counter-claim was erroneous, and should be reversed; and the same result would follow a review of the matter referred to in our second assignment of error.

III.

The pleadings of defendant in error are not supported by any evidence.

A failure to repay, on demand, *cash loaned* by this company to D. R. Boogher, is no breach of the latter's duties *as agent*. And although it might furnish ground for proceedings to recover the money in another manner, it is not sufficient to sustain the claim in the petition which only assigns, as breach of the bond of indemnity (Record, p. 3), "that said Davis R. Boogher has not faithfully discharged his duties *as agent* to plaintiff, that he has not paid or handed over to plaintiff all moneys belonging to plaintiff *which have been received by him or for which he is liable*, AS SAID AGENT, and plaintiff avers that said defendant owes and is indebted to plaintiff in the sum of $1,400.98 for money *received by him*, AS AGENT of plaintiff as aforesaid, and for which he is liable."

Where findings are contrary to the pleadings, this court will reverse the judgment.

Moore v. *Huntington*, 17 Wall. 417.

The undisputed evidence on which we have already commented, shows that the sum claimed in this suit is less by thousands than the sum loaned in cash to D. R. Boogher.

IV.

The language of the second (sealed) contract of employment between these parties, made December 23, 1873, is this: "15th. *This contract* ABROGATES ALL *former ones*, so far as new business is concerned." (Record, pp. 27 and 28.)

We claim that this means what it says; that it ABROGATED all the former contracts (of which *there were but two*, and,

hence the use of the plural — "*ones*" — instead of the singular number, which would have been used had only the "first contract of employment" been intended to be abrogated). It abrogated the former contract of employment (dated October 27, 1871), and the former contract of indemnity (dated December 22, 1871), — the bond sued on in this case, — so far as "*new* business" (*i.e.* business thereafter done) was concerned; and the referee has found that the only ground of complaint in this case concerns such new business. (Record, p. 88.)

Where language is not ambiguous, there can be no resort to intention for the construction of a contract.

Walker v. *Tucker*, 70 Ill. 527;
1 *Chitty on Contracts* (11th Am. ed.), p. 121.

Although the language of the bond was such as permitted a change of the terms of the agency, without releasing the securities, yet that fact can have no bearing on the question whether the bond was actually discharged or released (so far as new business was concerned) by *subsequent* valid agreement under seal. Even if parties expressly agree that a contract shall not be waived or altered, except in a particular manner, it is yet competent for such parties, by subsequent valid contract, to make such waiver or alteration, as part of a new agreement between them.

Cooke v. *Murphy*, 70 Ill. 96;
Ins. Co., v *Earle*, 33 Mich. 143;
Bishop v. *Busse*, 69 Ill. 403.

The answers of plaintiffs in error (Record, p. 27), setting forth the "special plea" of discharge, are not denied by the replies. The latter merely deny "that the stipulation therein set forth was part or any consideration to said defendant, in accepting and executing the contract bearing date December 23, 1873," and deny that plaintiffs in

error were released thereby. We assert that the "special plea" sets up a complete defence of discharge, which, by failure to deny, the replies admit. (*Ante*, p. 2.)

Wagner's (Mo.) *Statutes*, Vol. II, p. 1019, § 36, viz:—

"Every material allegation of the petition, not controverted by the answer, and every material allegation of new matter contained in the answer not controverted by the reply, shall, for the purposes of the action, be taken as true."

And the conclusion of law of the referee, that the said facts in the "special plea" do not amount to a discharge, is erroneous.

We submit that the judgment below should be reversed, the plea of discharge should be sustained, and the cause remanded for a new trial, upon the counter-claim of D. R. Boogher.

Respectfully submitted by

MARSHALL & BARCLAY,
with whom is
LINDEN KENT, Esq.,
} *Counsel for plaintiffs in error.*

October, 1880.

FILED
SEP 11 1880
JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT of the UNITED STATES

DAVIS R. BOOGHER, JESSE L. BOOGHER, RUFUS RANDALL, AND JOHN B. NOWLAN,
Plaintiffs in Error,
vs.
THE NEW YORK LIFE INSURANCE COMPANY,
Defendant in Error.

No. 307.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT AND BRIEF OF DEFENDANT IN ERROR.

FREDERICK N. JUDSON,
For Defendant in Error.

St. Louis: Press of G. I. Jones & Co.

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Defendant in Error.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT.

The New York Life Insurance Company, defendant in error, brought suit against plaintiffs in error upon the indemnity-bond executed by Davis R. Boogher, as principal, and his co-defendants as sureties, and conditioned as follows: —

"The condition of this obligation is such, that whereas "the above bounden Davis R. Boogher has been appointed "by said company as their agent for the purpose of pro- "curing applications for life insurance, and performing such "other duties in connection therewith as may be intrusted "to him: Now, if the said Davis R. Boogher shall pay or "hand over all moneys belonging to said company which "shall at any time be received by him, or for which he shall "be liable, whether the same shall be or shall have been "received by him personally and solely, or by, through, or "together with any co-partner, co-agent, sub-agent, or "other person, including all moneys so received prior to "the date of this instrument (if any such there be), as "well as that received thereafter, as also all moneys which "he now owes, or hereafter may owe said company, either "on account of advances to him or otherwise, and shall "faithfully discharge the duties as said agent, then this "obligation shall be void, otherwise to remain in full force "or effect. It being understood and agreed that this obli- "gation shall *not be annulled* or *revoked* without the con- "sent of the above-named company, but shall be and "remain in force as long as said Davis R. Boogher shall "continue to be the agent of said company, *whether under* "*his existing appointment or any future one*, and whether "such present or future agency be sole, or whether said "Davis R. Boogher be joined with any other person or per- "sons, and until all transactions under such agency shall "have been finally adjusted and settled, and all liabilities "of said Davis R. Boogher by reason thereof shall have "been discharged." (Printed record, p. 2.)

The bond was executed December 22, 1871, Boogher being then employed by the company under contract of appointment as soliciting agent, dated November 1, 1871. This contract contained minute provisions concerning the duties of the agent and the rate of commission allowed the agent upon premiums on policies of insurance effected by

or through him, none of which are material to the issues of this case. (Record, p. 4.) Provision was made for discharge of agent and forfeiture of his right to commissions on renewals in event of any dereliction of duty. Subsequently, December 23, 1873, the bond being still in force by its terms, a new contract of appointment was made, differing from the preceding as to rate of commissions allowed, and containing the following (printed clauses in the forms used by the company):—(Record, p. 8.)

"14. The commissions as above subject to the stipula-
" tions and limitations herein contained, shall continue to
" be paid to the said agent, or in case of his death, to his per-
" sonal representatives, for the term of ten years from the
" date of each policy, provided he shall continue to act ex-
" clusively for said company for term of five years; but in
" case said agent shall be *discontinued for cause* by said
" company, then *all commissions* which would accrue to
" him under *this* or any *former* contract shall be *forfeited*
" to said company *unconditionally*."

" 15. This contract *abrogates all former ones, so far as*
" *new business is concerned*."

The petition alleged a breach of the condition of the bond in that Davis R. Boogher, under these appointments, misappropriated funds of the company amounting to $1,400, and asked judgment therefor under the penalty of the bond.

The answer of plaintiffs in error denied the alleged default, and further, as special defence, claimed that as the acts complained of related to "new business" transacted after date of second appointment, by virtue of clause 15, above quoted, in such contract of appointment, the *bond* was *abrogated*, and that they were therefore released from the obligation sued on. (Record, p. 25.)

In addition, plaintiff in error Davis R. Boogher filed a separate answer, by way of counter-claim; alleged a breach on part of defendant in error of the contract of appoint-

ment of December 22, 1873, in refusing to permit him to collect premiums on insurances effected by him, and in refusing to perform the contract on its part, or to pay him according to its terms; and asked judgment for $6,000 damages, alleged to have been sustained by him by reason of such breach. (Record, p. 26.)

The reply of defendant in error denied any breach on its part of the contract of employment, and alleged that plaintiff in error, Davis R. Boogher, prior to the institution of the suit, had been discharged for *cause*, and thereby, under terms of the contract (art. 14, *supra*), all his rights under said contracts had been *forfeited unconditionally* to the company.

With issues thus joined, parties went into trial; but after impanneling of jury, by agreement of parties, a juror was withdrawn, and the case referred to Amos M. Thayer as referee.

The testimony before the referee disclosed that prior to the date of the second contract (December 23, 1873), plaintiff in error had largely misappropriated funds of the company, and the company agreed to continue him in their employ, on his making an agreement that the renewal commissions accruing to him under his contract should be retained by the company and applied to the reduction of his indebtedness. (Record, pp. 11, 12.) By this means Boogher's indebtedness was largely reduced, and, had it not been for subsequent defaults, would have been entirely extinguished. In spring of 1875, Boogher, in violation not only of the express stipulations of his contracts, but of the repeated expostulations and warnings of the company's officers, renewed his defalcations, and appropriated several premiums collected by him to his own use. The company, thereupon, on account of these misappropriations of its funds, withheld its policies of insurance from Boogher, in order to prevent him from collecting and appropriating the premiums thereon; but continued as theretofore, in all cases,

until his final discharge, as found by the referee (record, p. 87), to pay or credit to Boogher all the *commissions* to which he was entitled.

On the 18th of August, 1875, Boogher still continuing in default, the company made a demand, in writing, upon him for prompt payment of amounts of its funds thus collected and retained; and notifying him that in case of failure on his part to comply with this demand, the contracts would be annulled for cause, as provided therein. (Record, p. 33; referee's report, p. 87.)

At this time Boogher made various attempts to settle with the company and continue in his agency, by obtaining an advance from them to cover his indebtedness. Finally a proposition was made by the company to advance Boogher $150 per month, and suffer him to proceed under his contract, applying his commissions or renewals to the cancellation of his indebtedness; but this proposal was made conditional upon Boogher's obtaining the *assent of his sureties to the arrangement*, the company being unwilling, without such assent, to permit or suffer any increase in the existing indebtedness, for which they were entitled to look to the sureties for indemnity. This assent was not obtained, and no settlement was made. (Referee's report, p. 87 of record.)

Finally, after all hope of adjustment was abandoned, and Boogher had not only ceased to work for the company, but had entered into a contract with a rival company (record, p. 72), the defendant in error served notice in writing upon him that his agency was discontinued *for cause*, and all his claims under the contracts forfeited to the company. (Record, p. 33.)

The retention of the company's moneys by Boogher was not disputed by the plaintiffs in error; but it was pretended that this was authorized by the company's officers, by way of advance. The damages set up in the counter-claim of Davis R. Boogher were based upon the alleged *present worth* of the future *renewal* commissions to which, for a term

of ten years, under his contract he was entitled; and the sum of $5,317.61 was fixed by the expert, summoned by him, as the estimated present worth of these renewals at the time of the alleged breach, leaving the excess over indebtedness to the company, the *amount actually in controversy*, a little over $4,000. (See Arendt's testimony, record, p. 79.)

The referee, in a carefully prepared report, found against plaintiffs in error and in favor of defendant in error on all the issues, and against plaintiff in error (Davis R. Boogher) upon his counter-claim, holding that plaintiff in error (Davis R. Boogher) had been *discharged* for *good cause*, and his rights under his contracts *forfeited* under the provisions of the same; that the obligation of the bond was not annulled by the subsequent contract; and on a statement of the account between Boogher and the company, after rejecting a number of items claimed by defendant in error, returned a balance of $1,171.30 for which Boogher and his sureties were liable on the bond sued on.

This report was confirmed by the court, all exceptions being overruled, and judgment was entered for the amount of the penalty of the bond ($5,000) to be discharged upon payment of the sum of $1,217.52 (the amount of default found by referee, with interest).

Motions for new trial and for re-reference, on ground of newly discovered testimony, were successively made, and overruled, and the cause is brought to this court by writ of error.

BRIEF.

Defendant in error submits, —

First, That this court cannot take jurisdiction of this case upon this writ of error.

Second, That if it takes jurisdiction, the judgment must be affirmed upon the merits of the case, as presented to this court by the record for review.

And in *either* event, it is manifest that the jurisdiction of the court has been invoked on frivolous grounds, and that exemplary damages for vexatious delay should be awarded under the twenty-third rule of this court.

I.

THE JURISDICTION.

This suit was instituted in March, 1876.

It is clear that, as the writ is sued out by the defendants below, when the judgment against them upon a money demand was for only $1,217.30, *primâ facie* this amount is the measure of the jurisdiction of this court.

Gray *v.* Blanchard, 97 U. S. 564;
United States *v.* McDowell, 4 Cranch, 316.

As in Gray *v.* Blanchard, *supra*, the only possible pretense for upholding the jurisdiction here is that the set-off (or *counter-claim*) of one plaintiff in error (Davis R. Boogher) alleges damages in sum of $6,000.

But where a set-off or counter-claim is interposed, it is the amount actually *in controversy* which is still the test of jurisdiction, — *i.e.*, the amount for which defendant would recover judgment if *he* prevailed, the *excess* of his demand over that of plaintiff.

Ryan *v.* Bindley, 1 Wall. 66.

Nor is this court limited, in determining this question of jurisdiction, to the amount of damages claimed "by the "plaintiff in the declaration, a complaint upon a demand for "money only, or by the defendant in his counter-claim or "set-off;" but if the "*actual amount* in dispute does oth-

"erwise appear in the *record*, reference may be had to *that* "for the purpose of determining the jurisdiction of this "court."

Gray *v.* Blanchard, 97 U. S. 564.
Smithman v. Nat. Bank. 100, U.S. 86.

The application of these familiar principles to the facts disclosed by this record clearly establishes the absence of jurisdiction.

Notwithstanding the formal issues raised by the answer, there was upon the hearing substantially no controversy as to the existence of the indebtedness of Davis R. Boogher to the defendant in error. As to the counter-claim, the total claim advanced was for $5,317.65 (see record, p. 80), the amount fixed by plaintiff in error at the hearing, as the value of all his renewal commissions under his contracts at the time of the alleged breach. Hence, assuming for this question that this would be the proper measure of damages, and deducting the amount admittedly due defendant in error, we find that, conceding plaintiff in error, Boogher, all that he claims, the amount *actually* in *controversy* is but a little over *$4,000*. On no possible theory can the amount in controversy, as shown by the record, be made to exceed $5,000.

II.

THE MERITS.

But waiving the matter of jurisdiction, an examination of the record discloses but a single question of law, which is preserved for examination by this court. This is presented by the special plea of plaintiffs in error, alleging that they were released from liability on the bond sued on by virtue of the provision in the contract of December 23, 1873, that "this *contract* abrogates all former *ones*, so far as *new busi-* "*ness* is concerned."

In the light of the express stipulations of the bond, and the manifest reference of this provision in the contract to previous contracts regulating compensation and method of conducting business, it is difficult to discuss the proposition seriously, and it is unnecessary to add any thing to the finding of the referee.

"In most perspicuous language, the bond sued upon was "made to secure a faithful discharge of defendant's duty so "long as the defendant continued to be agent for the plain- "tiff, whether under his existing appointment or any "future one; thereby plainly indicating a continuous lia- "bility whilst the relation of agent continued, even though "defendant's rate of commission and mode of labor might "be changed from time to time to suit the convenience of "the parties. For these reasons, I hold that the special "plea of release from the obligation of the instrument "sued upon has not been maintained, and ought not to pre- "vail."

The reference of the case was made by consent of both parties; no exceptions are preserved to the admission or exclusion of testimony, which can be considered in this court (Burton *v.* Driggs, 20 Wall. 133); and as to the findings of *fact* by the referee, his report stands as a *special verdict*, and as to the weight of testimony to sustain it, will not be reviewed in this court.

Western Boatmen's Benevolent Assn. *v.* Kribben et al., 48 Mo. 41;
Heckers *v.* Fowler, 2 Wall. 131.

If this court *could* look behind the findings of the referee, into the facts of this case as disclosed in the record, it would find that the principal defendant below was treated with indulgent consideration by the company, until longer forbearance became impossible; that the interests of the sureties were scrupulously protected, where no legal obligation

existed on part of the company (Magee *v.* Manhattan Life Ins. Co., 92 U. S. 93), and that the defence presented was wholly without merit.

It is submitted that whether the record is held to show jurisdiction in this court of this writ of error, or not, such jurisdiction has clearly been invoked on *frivolous* grounds, manifestly for delay only; and inasmuch as this writ of error was made to operate as a *supersedeas*, delaying proceedings on the judgment below, defendant in error asks that, whether the writ of error be dismissed for want of jurisdiction or the judgment be affirmed, damages at the rate of ten per cent upon amount of judgment be awarded, in accordance with the twenty-third rule of this court.

Whitney *v.* Cook, 99 U. S. 607.

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For Defendant in Error.